TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 415

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTERS CLUBS, AND CONTRA COSTA COUNTY COMMUTERS ASSOCIATION, APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GOLDEN GATE TRANSIT LINES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED AUGUST 30, 1957
PROBABLE JURISDICTION NOTED NOVEMBER 12, 1957

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 30, 1958

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTER CLUBS, CONTRA COSTA COUNTY COMMUTERS ASSOCIATION, and AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, Divisions 1055, 1222, 1223, 1225, and 1471, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Civil Action No. 34985

COMPLAINT TO ANNUL ORDER OF INTERSTATE COMMERCE COMMISSION—Filed October 18, 1955

Plaintiffs named above allege as follows:

I.

County of Marin is a political subdivision of the State of California, within the Northern Judicial District of California; County of Contra Costa is a political subdivision of the State of California, within the Northern Judicial District of California; Marin County Federation of Commuter Clubs is an unincorporated association consisting of various commuter organizations whose members regularly use the bus services of Pacific Greyhound Lines [fol. 2] between various points in the County of Marin and the City and County of San Francisco, and its principal office is in the County of Marin, State of California; Contra Costa County Commuters Association is a non-profit corporation organized under the laws of the State of California, with its principal office in the County of

Contra Costa, State of California, whose members regularly use the bus services of Pacific Greyhound Lines between various points in the County of Contra Costa, on the one hand, and the City and County of San Francisco, and the cities of Oakland and Berkeley, on the other hand; Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Divisions 1055, 1222, 1223, 1225, and 1471, hereinafter called the Union, is a labor orangization (sic) affiliated with the American Federation of Labor, some of whose members are employed by Pacific Greyhound Lines in various capacities in connection with the bus service performed by Pacific Greyhound Lines between the City and County of San Francisco, on the one hand, and points in Marin County, State of California, on the other hand; between the City and County of San Francisco, and the cities of Oakland and Berkeley, on the one hand, and points in Contra Costa County, State of California, on the other hand; and between the City and County of San Francisco, on the one hand, and points in San Mateo and Santa Clara Counties, State of California, on the other hand.

II.

Pacific Greyhound Lines is a corporation organized and existing under the laws of the State of California and is engaged as a common carrier in the transportation of persons in interstate commerce by motor vehicle within the meaning of Section 203(14) and (16) of the Interstate Commerce Act, and is also engaged as a common carrier for compensation in the ownership, control, operation, and [fol. 3] management of passenger stages in intrastate commerce over public highways between fixed termini and over regular routes in the State of California within the meaning of Section 226 of the Public Utilities Code of the State of California. Pacific Greyhound Lines performs such transportation service for the transportation of passengers in interstate commerce and in intrastate commerce between the following points and in the following areas (among others), pursuant to various certificates of public convenience and necessity issued to it by the Interstate Commerce Commission (with respect to inter-

state commerce) and by the Public Utilities Commission of the State of California (with respect to intrastate commerce):

(a) Between the City and County of San Francisco, State of California, on the one hand, and various points in the County of Marin, State of California, on the other hand, and between various points within the County of Marin;

(b) Between the City and County of San Francisco, and the cities of Oakland and Berkeley, State of California, on the one hand, and various points in Contra Costa County, State of California, on the other hand; and

(c) Between the City and County of San Francisco, State of California, on the one hand, and various points in the Counties of San Mateo and Santa Clara, State of California, on the other hand.

Insofar as the operations which are material to this proceeding are concerned, approximately six per cent of the total revenue is derived from the transportation of passengers in interstate commerce and approximately 94 per cent of the total revenue is derived from the transportation of passengers in intrastate commerce. Said operations consist almost completely of local bus service within the metropolitan area surrounding San Francisco Bay.

[fol. 4]

III.

Golden Gate Transit Lines is a corporation organized under the laws of the State of California on May 7, 1953. It engages in no business activities and is not now, and never has been, engaged in any operations as a motor carrier within the meaning of either the Interstate Commerce Act or the Public Utilities Code of the State of California.

IV.

The Greyhound Corporation of Chicago, Ill., hereinafter called Greyhound Corporation, is a corporation organized

and existing under the laws of the State of Delaware and controls Pacific Greyhound Lines through ownership of approximately 98 per cent of the outstanding common stock and approximately 64 per cent of the outstanding preferred stock of Pacific Greyhound Lines. Greyhound Corporation is the parent company of a nationwide system of motor bus transportation which includes various subsidiaries in addition to Pacific Greyhound Lines.

V.

On or abouf February 8, 1954, Pacific Greyhound Lines, Golden Gate Transit Lines, and Greyhound Corporation filed with the Interstate Commerce Commission a joint application (to which the Interstate Commerce Commission assigned docket No. MC-F-5643) in which authority was requested under Section 5 of the Interstate Commerce Act (a) for Pacific Greyhound Lines to acquire control of Golden Gate Transit Lines through ownership of all of the outstanding capital stock of the latter, (b) for the contemporaneous purchase by Golden Gate Transit Lines of certain operating rights and property of Pacific Greyhound Lines in exchange for the outstanding capital stock of Golden Gate Transit Lines, and (c) for the acquisition of concurrent control by Greyhound Corpora-
[fol. 5] tion of Golden Gate Transit Lines and of the operating rights and properties to be acquired by the latter. Included in the operating rights sought to be transferred to Golden Gate Transit Lines in said application are various certificates of public convenience and necessity issued by the Public Utilities Commission of the State of California authorizing Pacific Greyhound Lines to engage in passenger stage operations (as defined in Sections 225 and 226 of the Public Utilities Code of the State of California) for the transportation of passengers by motor vehicle in intrastate commerce between the points and areas described in paragraph II, above.

VI.

The Interstate Commerce Commission conducted a public hearing on said application before Examiner Irving R.

Raley in San Francisco, California, on April 13 and 14, 1954, and plaintiffs named above appeared at such hearing and participated therein as protestants, and objected to the granting of said application on the grounds that the proposed transaction (a) was not within the scope of Section 5 of the Interstate Commerce Act and (b) was not consistent with the public interest. Thereafter, on or about October 20, 1954, said Examiner issued his proposed report recommending denial of said application.

VII.

On July 6, 1955, the Interstate Commerce Commission issued its Report and Order in said matter, in which, contrary to the proposed report of said Examiner, it granted said application subject to the terms and conditions set forth in the Order. A copy of said Report is attached hereto as Exhibit A, and a copy of said Order is attached hereto as Exhibit B.

[fol. 6]

VIII.

On or about August 11, 1955, plaintiffs named above filed with the Interstate Commerce Commission their petitions for rehearing and reconsideration of said decision and order of July 6, 1955, in which they urged the same grounds set forth above in Paragraph VI and requested an opportunity to present further evidence. Said petitions were denied by the Interstate Commerce Commission on September 19, 1955, by an order, a copy of which is attached hereto as Exhibit C. By its further order dated September 27, 1955, a copy of which is attached hereto as Exhibit D, the Interstate Commerce Commission postponed the effective date of said Order of July 6, 1955, to October 19, 1955.

IX.

This action is brought to suspend, enjoin, annul, and set aside said Report and Order of the Interstate Commerce Commission dated July 6, 1955. Jurisdiction and venue of this Court are based upon the provisions of United States Code, Title 28, Section 1336, 1398, and 2321 to 2325,

inclusive. Plaintiffs are informed and believe that Pacific Greyhound Lines, Golden Gate Transit Lines, and Greyhound Corporation have not as yet taken any steps to effectuate the transfers authorized by said Order of the Interstate Commerce Commission, and for that reason plaintiffs are not seeking a restraining order or interlocutory injunction at this time. In the event Pacific Greyhound Lines, Golden Gate Transit Lines, or Greyhound Corporation should hereafter attempt to carry out any provision of said Order during the pendency of this action, plaintiffs request leave to present to the Court at that time an application for a temporary restraining order or an interlocutory injunction, or both, to stay and suspend the operation of said order until final hearing and de- [fol. 7] termination of this action and to present to the Court in connection therewith such supplemental pleadings and motions as may be appropriate.

X.

The findings and conclusions of the Interstate Commerce Commission as set forth in said Report and Order of July 6, 1955, are erroneous and contrary to law; and said Order is invalid and illegal, for the following reasons:

(a) The transactions described in said application and authorized in said Order are not within the scope of Section 5 of the Interstate Commerce Act, and particularly of subdivision (2)(a) thereof;

(b) Golden Gate Transit Lines is not a "carrier" within the meaning of that term as used in Section 5(2)(a) of the Interstate Commerce Act;

(c) The transactions described in said application and authorized in said Order do not involve

(1) the consolidation or merger of the properties or franchise of two or more carriers, or

(2) the purchase, lease, or operation by one carrier, or two or more carriers jointly, of the properties of another carrier, or

(3) the acquisition, by one carrier, or two or more carriers jointly, of the control of another carrier, or

(4) the acquisition by a person which is not a carrier of control of two or more carriers, or

(5) the acquisition by a person which is not a carrier, but has control of one or more carriers, of control of another carrier.

WHEREFORE, plaintiffs pray as follows:

1. That this cause be heard by a three-judge court as [fol. 8] provided in Sections 2284 and 2325, Title 28, of the United States Code;

2. That this Court issue its order permanently suspending, enjoining, annulling, and setting aside the Report and Order of the Interstate Commerce Commission dated July 6, 1955, and more particularly described in the foregoing complaint;

3. That, in the event of subsequent application therefore, this Court issue a temporary restraining order, or an interlocutory injunction, or both, staying and suspending the operation of said Report and Order pending the final hearing and determination of this action; and

4. That plaintiffs have such other relief as the Court may deem appropriate.

Respectfully submitted,

/s/ Spurgeon Avakian, Financial Center Building, Oakland 12, California; /s/ Jack Robertson, Keating Building, Menlo Park, California; Attorneys for Plaintiffs.

W. O. Weissich, District Attorney, Marin County, San Rafael, California; Francis W. Collins, District Attorney, Contra Costa County, Martinez, California, Of Counsel.

October 18, 1955.

[fol. 9] EXHIBIT "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. MC-F-5643[1]

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

Submitted March 16, 1955. *Decided July 6, 1955.*

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1. Application of Pacific Greyhound Lines for authority to acquire control of Golden Gate Transit Lines through ownership of capital stock and for the contemporaneous acquisition by Golden Gate Transit Lines of certain operating rights and property of Pacific; and of The Greyhound Corporation to acquire control of Golden Gate Transit Lines through stock ownership, and of the operating rights and property through the transaction, approved and authorized, subject to conditions.

2. Application by Pacific Greyhound Lines for a certificate of public convenience and necessity authorizing continuance of operations by it in interstate or foreign commerce between certain points in California, granted.

Allen P. Matthew and *Gerald H. Trautman* for applicants.

Spurgeon Avakian and *Jack Robertson* for protestants.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by applicants and by the protesting labor union to the examiner's proposed report which

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[1] This report embraces No. MC-1511 (Sub-No. 103), Pacific Greyhound Lines, San Francisco, Calif.

recommended denial of the applications, and a reply to applicants' exceptions was filed collectively by the other protestants. Pursuant to applicants' request, oral argument was heard on March 16, 1955, in which applicants and all protestants participated. Our conclusions differ from those of the examiner.

By joint applications filed February 8, 1954, as amended, Pacific Greyhound Lines and Golden Gate Transit Lines, both of San Francisco, Calif., herein called Pacific and [fol. 10] Golden Gate, respectively, seek authority under section 5 of the Interstate Commerce Act (1) for Pacific to acquire control of Golden Gate through ownership of all its outstanding capital stock, and (2) for the contemporaneous acquisition by Golden Gate of certain operating rights and property of Pacific. The Greyhound Corporation of Chicago, Ill., herein called Greyhound, which controls Pacific through ownership of a majority of its outstanding common capital stock[2] has joined in the application and seeks authority to acquire concurrent control of Golden Gate and of the operating rights and properties through the transaction. In a separate application, as a matter directly related to the applications under section 5, Pacific, in No. MC-1511 (Sub-No. 103), as amended, seeks a certificate of public convenience and necessity authorizing continuance of operations by it in interstate or foreign commerce between certain points in California, over portions of the routes over which Golden Gate would operate as a result of the purchase. The joint board having waived participation in No. MC-1511 (Sub-No. 103), a consolidated hearing was held before the examiner, at which Divisions

[2] See the report in Finance Docket No. 18382, *The Greyhound Corporation Securities*, I.C.C. , decided April 22, 1954, for a discussion of certain financing plans in furtherance of Greyhound's long-range program to integrate into its organization 8 of its bus operating subsidiaries, including Pacific, and also 2 companies in which Greyhound owns no stock. In the pending application in No. MC-F-573, The Greyhound Corporation—Merger—Pacific Greyhound Lines; Control—California Parlor Car Tours Co., the merger of Pacific into Greyhound is proposed. That application reflects ownership by Greyhound as of November 12, 1954, of 97.8 percent of the outstanding common stock and 63.9 percent of the outstanding preferred stock of Pacific.

1055, 1222, 1223, 1224, and 1471, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, herein called the Union, the counties of Marin and Contra Costa in California, herein collectively called [fol. 11] the Counties, the Federation of Marin County Commuter Clubs, and the Contra Costa County Commuters Association, the last two herein collectively called the Commuter Associations, opposed the applications. Greyhound and Pacific operate substantially more than 20 motor vehicles.

Greyhound, a Delaware corporation, is the parent company of the nationwide system of motor bus transportation. It operates in interstate or foreign commerce as a motor common carrier of passengers over regular routes through the medium of autonomous operating divisions, which form integrated operating units within the company, and it controls a number of separate operating subsidiary corporations. It also controls several terminal, garage, and other noncarrier companies. Greyhound's outstanding capital stock is widely distributed, the 10 principal stockholders owning and holding for the benefit of others, in the aggregate, 9.49 percent of the common voting stock as of March 2, 1953, the largest block of which constitutes 3.53 percent.

Pacific[3] operates as a motor common carrier of passengers between points in California, Oregon, Nevada, Utah, Texas, Arizona, and New Mexico.[4] It conducts intercity operations over routes between Astoria, Oreg., and San Diego, Calif.; between San Francisco and Salt Lake City, Utah; between Los Angeles and Albuquerque, N. Mex.; and between Los Angeles and El Paso, Tex. In [fol. 12] combination with other members of the Grey-

[3] Pacific holds 100 percent of the stock of California Parlor Car Tours Company, which conducts a touring service between San Francisco and certain points in California, Reno, Nev., and Grants Pass, Oreg.

[4] Its interstate operations are conducted pursuant to certificates issued in No. MC-1511 and subnumbered proceedings. Pacific has pending, in No. MC-1511 (Sub-No. 102), an application for a certificate consolidating and superseding all of its presently outstanding separate certificates.

hound system and with other bus lines, Pacific has been providing joint through service between San Francisco, on the one hand, and, on the other, Seattle, Spokane, Chicago, St. Louis, and Boise; and between Los Angeles, on the one hand, and, on the other, Seattle, Chicago, San Diego, Memphis and New Orleans.

Pacific conducts extensive intrastate operations in California, and provides commutation or "mass transportation" service in and around the San Francisco Bay area under certificates issued by the California Commission, over routes embraced also in certificates issued by this Commission covering its interstate operations. These commuter operations cover distances up to 25 or 30 miles, radiating from San Francisco to the suburban area, north into Marin County, south on the Peninsula, and east into Contra Costa County. More specifically, the Marin County service includes Stinson Beach, Sausalito, Marin City, Mill Valley, Corte Madera, Larkspur, San Rafael, Ross, San Anselmo, Fairfax, Hamilton Field, Inverness, Bolinas, and Novato; the Contra Costa operation extends from San Francisco and Oakland and includes Berkeley, Martinez, Port Chicago, Orinda Corners, Lafayette, Walnut Creek, Concord, Camp Stoneman, Crystal Pool, Monument, Pittsburg, Antioch, Danville, and Dublin; and the Peninsula and Half Moon Bay operations include South San Francisco, San Francisco Airport, San Bruno, Millbrae, Burlingame, Belmont, San Carlos, San Mateo, Redwood City, Menlo Park, Bellhaven, Palo Alto, Sharp Park, Rockaway Beach, Montara, El Granada, and Half Moon Bay. The local operations represent 3.08 percent of Pacific's total route miles, account for 7.44 percent of its bus miles operated, and produce 9.16 percent of its gross [fol. 13] passenger revenue; but they account for 35.49 percent of the total number of passengers transported by Pacific. Marin County has a population of about 100,000, the area served in Contra Costa County, 60,000,[5] and the Peninsula 250,000.

Golden Gate, which was incorporated on May 7, 1953, has engaged in no business activities and is not now a

[5] The Rand McNally Road Atlas shows the population of Contra Costa County for 1950 as 298,984.

motor carrier. Pursuant to an agreement entered into on January 27, 1954, and a supplemental agreement of April 8, 1954, between Pacific and Golden Gate, the latter would acquire from the former, with the exception of authority over an alternate route between Danville and Dublin, over California Highway 21, which applicants request be canceled, the above-described interstate and intrastate operating rights of Pacific in the San Francisco Bay area, including intrastate authority within the cities of San Francisco, Oakland, Pittsburg, and Berkeley essential for operations in connection with the routes purchased. The interstate operating rights to be acquired are specifically set forth in Appendix A hereto, and our findings will be conditioned to cancel the operating rights over the alternate route mentioned. Golden Gate would also receive from Pacific $150,000 in cash, 52 buses recently purchased by Pacific under conditional sales contracts, 138 transit-type buses, and fare boxes used in the operations, and it would acquire Pacific's rights and assume its obligations in certain leaseholds and other contracts pertaining to the commuter operations. In payment therefor, Golden Gate would issue to Pacific all of its capital stock, consisting of 300,000 shares of $1 par value common, assume the outstanding indebtedness on the 52 buses, and it would be obligated to pay to Pacific the difference between such indebtedness and the net book value of the buses at the date of consum- [fol. 14] mation. The amount of the difference would be carried by Golden Gate as an open account indebtedness to be repaid to Pacific as it is able to do so.

Principally in order to continue utilizing the routes in its long-haul interstate service, over which Golden Gate would render the commuter service as a result of this transaction, Pacific requests, in No. MC-1511 (Sub-No. 103), that a certificate be issued to it authorizing the transportation of passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers, in the Marin County area between Novato and San Francisco; in the Contra Costa County area between San Francisco and Oakland, between Port Chicago and Antioch via Pittsburg, between Pittsburg and Antioch via Camp Stoneman, and between Martinez Junction and Camp

Stoneman, via Concord Junction and Camp Stoneman Junction; and in the Peninsula area between San Francisco and Palo Alto, via San Mateo and also via Bellehaven, between San Francisco and Half Moon Bay, and between Half Moon Bay Junction and Crystal Springs Dam, with the latter two routes restricted to service during the summer months. Pacific would serve all intermediate points on these routes except those on the segment between Freeway Junction and Airport Overpass, which is southwest of San Francisco International Airport. With a few exceptions, the authority sought by Pacific in No. Mc-1511 (Sub-No. 103), duplicates and constitutes part of the routes which Golden Gate would acquire in No. MC-F-5643. As long as it is able to secure access into and out of San Francisco on its long-haul operations, Pacific would accept any restriction that might be imposed.

[fol. 15] Golden Gate would operate under the same schedules now observed by Pacific. If necessary in the performance of the "local" service, Pacific would lease additional buses, up to 100, to Golden Gate at a rental based on the actual cost to Pacific of supplying the buses, including depreciation and a return on investment. Those terminals handling a preponderance of local traffic would be transferred to Golden Gate. Those terminals owned by Pacific, such as the ones at San Rafael and Palo Alto, would be leased to Golden Gate at a rental covering depreciation, taxes, and return on investment, and Pacific's leases on terminals such as those at Redwood City, San Mateo, and the San Francisco Ferry Building terminal, the latter exclusively used for commutation purposes, would be assumed by Golden Gate. Pacific would pay for its continued use of the first four terminals on a commission basis, Golden Gate would operate from Pacific's terminal at Oakland on a commission basis, and a portion of the cost of operating Pacific's San Francisco Seventh Street terminal would be allocated to Golden Gate on a trip basis. Charges, consisting of rentals, taxes, and insurance, to be assumed by Golden Gate with respect to terminal facilities aggregated approximately $26,500 a year as of April 14, 1954.

Pacific's servicing and maintenance facilities in San Francisco would be available to Golden Gate on a joint facility basis, with Golden Gate responsible for direct [fol. 16] costs and its allocable share of overhead expenses. Gasoline and oil would be furnished at cost. Golden Gate's offices would be located temporarily at the Seventh Street terminal in San Francisco, and it would be free to change any existing arrangements with respect to terminal, maintenance or other facilities. Golden Gate would have a separate management under a president or manager skilled in mass transportation. However, Pacific's representatives would at all times consitute a majority of Golden Gate's board of directors, although none would be directors of Pacific, and the board would include a representative from each of the areas served who would give particular consideration to the problems of his specific area.

Golden Gate would hire those employees of Pacific directly engaged in the local services who desire to transfer, and would assume all of Pacific's obligations to such employees under the terms of the collective bargaining agreement now in effect between Pacific and the Union. Pacific claims there would be no loss of employment. It is expected that approximately 310 drivers, 11 station employees, 13 supervisors and between 10 and 20 accounting and clerical employees would be transferred to Golden Gate. Pacific is willing to accept such protective conditions for employees as we may impose, but the Union has not indicated any withdrawal of its opposition by reason of this statement by Pacific.

Under the agreement between the parties, Pacific would not conduct any "local" services in the area except that it would transport passengers moving in interstate commerce on its through buses over its retained routes. In other words, where permitted by the rights, applicants would have an arrangement for the optional honoring of interstate tickets in any area where a better service could be [fol. 17] provided through such an arrangement. A joint fare arrangement between Golden Gate and Pacific is also contemplated to facilitate transfers of passengers at connecting points, although from past experience, it is not anticipated that such interline traffic would be substantial.

Pacific would not transport any passengers in intrastate commerce over Golden Gate's routes, except to or from points beyond. It will be noted that this entails the transfer to Golden Gate of intrastate operating rights over the routes indicated, and the retention by Pacific of authority to transport intrastate traffic over certain of the same routes in its long-haul operations—somewhat similar to the proposal for the transportation of interstate traffic, which occasioned the filing of the application in No. MC-1511 (Sub-No. 103). There is some question in the record as to whether Pacific would continue to hold intrastate rights between Redwood City and San Francisco. However, Pacific would continue to hold intrastate rights, duplicating portions of intrastate authority being transferred to Golden Gate, within the cities of San Francisco, Oakland and Pittsburg over routes considered essential for the conduct of its intercity operations.

In addition to those routes over which Pacific would continue to operate in interstate commerce, transporting passengers between the same points, there is, and would continue to be, traffic in interstate commerce to and from points on routes which would be served only by Golden Gate, and as illustrative of this, the evidence shows that during the month of October 1953, 60 passengers purchased tickets at such points in Marin County (11 at Sausalito, 9 at Mill Valley, 3 at Fairfax, 13 at San Anselmo, 14 at Marin City, and 10 at Hamilton Field), for revenue of [fol. 18] $1,656; 36 at points in the Peninsula area (12 at San Bruno, 22 at Burlingame-Howard, and 2 at Millbrae), for revenue of $642; and 54 at points in Contra Costa County (8 at Lafayette, 22 at Walnut Creek, 1 at Monument, and 23 at Concord), for revenue of $1,175; or a total of 150 passengers and $3,473. This compares with additional interstate tickets purchased during the same month by 523 passengers, for total revenues of $13,980, at stations, other than San Francisco and Oakland, to be served by both Golden Gate and Pacific.[6] It is estimated that if

[6] The above figures for October 1953 show ticket sales outbound from the given points. However, it is estimated that the volume of interstate traffic flowing into the territory is approximately the same.

Golden Gate had operated over the considered routes for the entire year 1953, it would have received $3,694,600 in passenger revenue from both its interstate and intrastate traffic.

Pacific's balance sheet as of October 31, 1953, shows the following:

Assets

Current		
Cash	$1,510,658	
Temporary cash investments	4,842,189	
Accounts receivable (net)	1,904,945	
Material and supplies	562,762	$ 8,820,554
Tangible property, less depreciation		18,163,410
Intangible Property (net)		3,890,368
Investment securities and advances		
Associated and subsidiary companies	$ 657,633	
Other	184,034	841,667
Special funds		6,707,017
Deferred debits		281,526
Total assets		$38,704,542

[fol. 19] *Liabilities*

Current		
Accounts payable	$6,729,335	
Taxes accrued	4,817,224	
Other current liabilities	668,681	$12,215,240
Advances payable		55,397
Equipment obligations		66,299
Deferred credits		49,462
Reserves		3,291,194
Capital stock		14,595,000
Earned surplus		8,431,950
Total liabilities		$38,704,542

Income statements

	Net Income	
	Before Taxes	*After Taxes*
1951	$7,289,617	$3,368,751
1952	6,506,374	3,303,874
1953 (first 10 months)	6,973,269	2,980,269

Golden Gate's balance sheet giving effect to the proposed transaction as of April 1, 1954, would have shown assets aggregating $1,455,960, consisting of $150,000 in cash, the 52 new buses, 138 additional buses, and 194 cash fare boxes, having net book values of $1,155,960, $130,537, and $19,461, respectively, and intangible property $2. Its liabilities[7] would have consisted of equipment obligations totaling $982,566 on the 52 buses, represented by conditional sales contracts to be assigned to Golden Gate, payable in 24 quarterly installments at 3¾ percent interest on the unpaid balance, with $163,761 due within one year and $818,805 [fol. 20] due after one year; open account indebtedness of $173,394 to reimburse Pacific for its payments on the new buses; and $300,000 in par value common stock to be issued to Pacific.

A pro forma income statement shows that if Golden Gate had conducted the "local" services, it would have had an estimated net operating loss of $234,300 for 1953 under then existing effective fares. At the time of the hearing Pacific had pending an application before the California Commission, filed on May 18, 1953, seeking an increase in its fares for operations in the Marin County area and, to a much smaller extent, in another county not here involved. Applicants estimated that the granting of the requested increase would provide additional annual revenue to Golden Gate of $254,000, thus changing Golden Gate's estimated deficit into an estimated net income of $19,700. However, since issuance of the proposed report, the California Commission, on November 4, 1954, authorized an increase which, according to the report of the California Commission attached to applicant's exceptions, will produce estimated

[7] Golden Gate would assume no obligations and would issue no notes or other securities within the meaning of section 214.

additional revenue of about $84,000 a year. The California Commission, in granting that increase, recognized that if the then existing fares were continued during the year ending June 30, 1955, an estimated loss of $389,800 would be sustained for the Marin County operations, and that Pacific's losses for its overall California intrastate operations would be $1,202,200.[8] The California Commission explained that although the granted increase still would not provide sufficient revenue to cover the cost of the Marin County operations, a sharp increase as proposed by Pacific would also fail to place the Marin County operations on a self-sustaining basis, because the law of diminishing returns would cause diversion from Pacific of a substantial part of its commutation patronage. To the extent this additional revenue may be applicable to the Marin County operations, the proportion or amount of which is not indicated, Golden Gate's estimated deficit would be decreased.[9]

The operations which Golden Gate would acquire involve the transportation, over short distances, principally of daily commutation passengers at special fares, with the peak traffic volume being inbound to San Francisco between the hours of 7 a.m. and 9 a.m., and outbound between the hours of 4:30 p.m. and 6:30 p.m. In the case of Marin [fol. 21] County traffic, 90 transit-type buses are operated by Pacific during a peak period, whereas service on that route during the balance of the day requires only 19 buses, the remaining buses and drivers being idle during the off-peak period. The Contra Costa operation is similar to the Marin County service, although the traffic volume is not as great. The Peninsula traffic is subject to less pronounced peaks because the Southern Pacific Railroad provides for the great bulk of the commutation service in that area. In contrast to the mass transportation problem, Pacific's intercity or mainline traffic does not consist of

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[8] This figure includes consideration of a downward trend of traffic among other things.

[9] Counsel for Pacific stated at the oral argument that a petition for rehearing has been filed in that proceeding, and also that an application for an increase in fares on the Peninsula had been filed with the California Commission.

regular daily passengers, the usual one-way and round-trip fares are charged instead of reduced commutation fares, longer trips are involved, and mainline equipment is utilized. A single contract with the Union covers employees of both the "local" and long-distance services, although it includes separate sections that apply specifically to the different services, one of the principal differences being the payment of mainline drivers generally on a mileage basis, whereas "local" drivers are paid on an hourly basis. No other company in the Greyhound system operates a commutation service of the character or magnitude of that existing in the San Francisco Bay area and Pacific has no comparable "local" or commutation service in any other area.

To show that the transaction would be consistent with the public interest, applicants submitted evidence concerning certain historical "problems" which, they contend, would be solved by this proposal. It appears that prior to the recently authorized increase, only minor adjustments had been made in the commutation fares since 1940 or 1941, despite an increase, according to Pacific, of over 100 percent in the cost of providing the service; and during [fol. 22] 1953, Pacific sustained a deficit of $234,300 in conducting these operations. On the other hand, Pacific contends that the fares of two other commutation services, operating in the San Francisco and Los Angeles areas, have been increased by over 100 percent since 1941. This depressed fare structure, applicants maintain, has resulted in a loss of practically all of Pacific's capital investment in the local operations, and losses in Marin County operations alone have exceeded $2,000,000 since inception of that service in 1941. Pacific attributes this situation to the rate-making policy of the California Commission, which the commuter organizations defend. Pacific contends that this policy has required the subsidization of the services under these commutation fares by the revenue from the systemwide intercity operations, without regard to the circumstances and costs of the "local" operations, and that this has seriously affected its ability to compete in the face of a declining traffic volume. The insistence by the California Commission upon the preparation and sub-

mission of systemwide statistics and accounting in the determination of proceedings involving the "local" commutation fares has increased Pacific's costs and required the maintenance of records and statistics, which, applicants contend, could be eliminated under the proposed separation, resulting in substantial savings. Applicants further submit that in addition to the savings resulting from the simplification of rate proceedings and maintenance of records, other savings, such as in station and insurance expense, may be realized by the separation because of operational and managerial improvements and abandonment of mainline carrier practices in the local operations.

Applicants emphasize that the proposed separation will effectively resolve existing problems of management. While Pacific's long-haul operations are the source of its financial strength, producing 90 percent of the system revenue, the exacting demands of the commuters have caused its president to devote 15 percent of his time to the "local" opera- [fol. 23] tions, its auditor and his staff 70 percent, and its vice president in charge of operations 25 percent.

In order to advise and assist Pacific in the organization of Golden Gate, to select the management for the latter and to recommend policies in the operations of a truly suburban service by Golden Gate, Pacific has engaged an expert with 30 years' experience in local transit operations. He expressed the opinion that there should be a complete separation since the service which Golden Gate would render is distinct, from an economic and traffic standpoint, from that which Pacific would continue; and that the proposed operation by Golden Gate is entirely feasible and would be more easily adaptable to the special needs of its patrons and to integration with local activities and overall planning.[10] He stated that the interests of Pacific's

[10] The California State legislature has appropriated funds for a survey of the transportation system in the area, and it is contemplated that a San Francisco Bay Area Rapid Transit District will be established to relieve traffic congestion. All the territories to be served by Golden Gate are within the boundaries of the proposed transit district, and it is expected that the "local" operations would be integrated into, and supplement other services in, such a transit

management lie elsewhere; that the management problem will not be solved unless a separate corporation is set up because "you can't serve two masters"; that establishment of a separate management in charge of local operations subject only to supervision by Pacific's board of directors, which would not be "local" minded, is impractical; and that Golden Gate should have a separate board of directors, a majority of which should be local representatives from the areas served.

[fol. 24] Part of the over-all management problem is that of labor-management relations which, although strongly disputed by the Union, applicants contend would benefit from the proposed separation of the operations. The negotiation of employment contracts with the Union in the past has been made especially difficult because the terms applicable to the two classes of drivers have been embraced in a single labor agreement, even though the operating practices have been different. As an illustration, the current agreement was negotiated following settlement of a strike which forced suspension of Pacific's entire operations for 79 days, the principal issue being the Union's demand for a five-day week for the mainline drivers, based on the fact that the "local" drivers were granted a 5-day week, thus making Pacific the first major motorbus carrier in the United States to make such a concession. In addition, Pacific claims that the ill will engendered by the unfavorable publicity incident to its "local" difficulties has reflected upon its reputation and has affected the volume of long-haul traffic it secures in this area.

Although not an intervener in this proceeding, on March 23, 1954, the Secretary of the California Commission addressed a letter to us, a copy of which was transmitted to Pacific and introduced in evidence by the latter, stating the position of that Commission to be that the proposed transfer of the "local" operations is wholly unnecessary, would create a questionable expense, and would tend to

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system, thus making it possible for patrons to travel between any points in the entire transit district. The study will probably not be completed before the end of 1955.

create uncertainty and confusion when the fixing of intrastate rates for Golden Gate might be considered; that the capital structure of Golden Gate would be of questionable soundness; that it would not recognize any transfer of the intrastate operating rights without its approval; and that the transfer would be contrary to the public inter- [fol. 25] est unless conditioned to provide (a) that neither Golden Gate nor Pacific will ever claim or urge that Pacific's total intrastate operating results should not be considered for the purpose of prescribing intrastate rates for Golden Gate, (b) that Pacific shall agree to take back the operations from Golden Gate if and when ordered to do so either by this Commission or the California Commission, and then to restore the operations to the status and condition existing at the time of the transfer to Golden Gate, and (c) that Pacific and Golden Gate shall file written undertakings agreeing to the two stated conditions.

Pacific, reiterating that the local operations should be self sustaining, states that the first proposed condition is unacceptable. At the hearing, Pacific's vice president in charge of operations stated that Pacific also would not be willing to accept the second proposed condition, although in a letter to the California Commission, dated a week prior to the hearing, Pacific's president, with the concurrence of the vice president, stated that while imposition of the second condition would not be just, reasonable, or necessary, he felt that Pacific would accept it if we were to condition our order in these proceedings to require Pacific to agree that within some specified period it would take over Golden Gate's operations, upon order, after hearing, of this Commission.

The Union, the Counties, and the Commuter Associations collectively question the jurisdiction of this Commission over the proposed transaction under section 5 on the ground that Golden Gate is not a "carrier" as defined in the act, that it must first acquire the status of a "carrier" before jurisdiction attaches under section 5, and that the proposed transaction therefore, is not within the scope of section 5(2)(a)(i) which may be authorized. It is apparent that if the transaction were accom-

[fol. 26] plished without our prior authority it would be in violation of section 5(4). Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under section 5. *Columbia Motor Service Co.—Purchase—Columbia Terms. Co.*, 35 M.C.C. 531. Jursidiction over a transaction which is subject to section 5 is exclusive and plenary under the plain language of paragrpah 11 of section 5, and, upon our approval of such a transaction, the applicants would have full power to "carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority".

The Union further argues that the transaction is contrary to this Commission's long-standing policy favoring corporate simplification, and would adversely affect transportation service to the public in that (1) Golden Gate would not be financially capable of insuring continued service, (2) less service would be provided to the commuters who alread find existing service inadequate and who would be deprived of their present option of riding on either intercity or local buses, (3) the extensive shifting, as a result of the transaction, of employees between the "local" and intercity operations would reduce labor efficiency and result in loss of time and expense to the employer and employee, and, in some instances, cause a loss of jobs, (4) the lowered morale resulting from the shifting of personnel, the negotiation of two labor contracts instead of one, and the creation of smaller collective bargaining units which would tend to diminish the re- [fol. 27] straining influences of varying interests within the unit, would increase the possibilities of strikes, probably resulting in service interruptions in both companies, and (5) the proposal would result in high costs to both companies.

The Counties and the Commuter Associations, like the Union, point to Golden Gate's limited capital, the possible impairment of labor relations, and question whether any savings would result which could not as easily be realized

by conducting the "local" operations as an independent division. They argue that the separation of management can be accomplished as well by the creation of a separate operating division as by the creation of a subsidiary corporation, pointing to the pending application wherein Pacific would be merged into its parent company and operated as a division of that carrier; that the real reason for the proposal is to disconnect the local operations for rate-making purposes, and thus defeat the California Commission's practice of determining proposed fare increases for the "local" operations in the light of Pacific's systemwide operations and revenues; and that the public would be prejudiced by the establishment of Golden Gate's future fares. They argue at some length in support of the rate-making policy of the California Commission, contending that the losses experienced by Pacific in the "local" operations because of the low fares are counterbalanced by the excessive rate of return in other parts of Pacific's system where the fares cannot be reduced because of the revenue needs of Pacific's competitors. These interveners urge that the matter of separating these operations, which are primarily in intrastate commerce, be left to the California Commission.

In their exceptions and at the oral argument, applicants argue that the examiner erred in not finding that sub- [fol. 28] stantial benefits in management, operations, and public relations would result from consummation of the proposed plan in matters where the cooperation or lack of cooperation of the California Commission and the Union would make no difference; and they add that under present rules of the California Commission and according to practices applied in the treatment of other commutation subsidiaries, simplified accounting and expeditious handling of rate cases, without regard to system earnings, will result from the separation. Pacific expects Golden Gate to be self-sustaining if present gross revenues from the "local" operations of nearly $4,000,000 are increased by 20 to 25 percent through an upward adjustment of fares. Counsel for Pacific stated at the oral argument that he believed Pacific would accept a condition requiring it to furnish more working capital to Golden Gate than

the proposed $150,000, and he renewed the offer to accept a condition to approval herein, requiring Pacific to agree that within a specified period it would take over the operations of Golden Gate if we should order it to do so. Applicants insist in their argument that section 5 of the act does not require a showing that the proposed plan will result only in affirmative public benefits or that all benefits possible of accomplishment will be accomplished, affording a solution to all existing problems, nor must improved service to the public be shown, but that probable benefits to the entire public, intercity patrons as well as commuters, must be balanced against probable injuries, and that a plan, proposed in the carrier's managerial discretion, should be approved unless found to be "contradictory", "Hostile" or injurious to the public interest. Even if the California Commission and the Union do not treat the two corporations as separate entities, applicants state, the situation would be as [fol. 29] it presently exists and the public interest would not be prejudiced; but the public interest will be promoted to the extent that any of the problems are alleviated. On the other hand, they submit, unless separation is authorized, existing problems will become aggravated when the dissimilar "local" operations become blanketed with the nationwide operations of Greyhound upon merger of Pacific with its parent.

Admitting that, through the proposed transaction, they hope to escape from the previously described rate-making practices and policies of the California Commission, applicants argue that we should be seriously concerned with the results of those practices and policies, and that we should approve the transaction to alleviate the burden placed on interstate commerce through the California Commission's policy of requiring a subsidization of intrastate operations by revenues derived from interstate operations, and thus further the national transportation policy by promoting efficient service and fostering sound economic conditions in transportation.

Pacific states that after the transfer it would be necessary for it to continue operations over some of the same routes as Golden Gate in order to obtain access to its

terminals in San Francisco and Oakland, but, if there is serious objection to this duplication, applicants would accept a condition, albeit reluctantly, whereby Golden Gate's duplicating interstate rights would be canceled upon consummation of the transaction. If this were done, the remaining interstate operating rights of Golden Gate would be negligible both from the standpoint of points and traffic.

[fol. 30] The Counties and the Commuter Associations argue that the service in question, which is almost completely intrastate in character, should be left to local regulation, that this Commission should not set itself up as an appellate body to review the validity of rate orders of the California Commission, that it was never contemplated that this Commission should act in such a capacity, and that the proceedings before the California Commission are not a part of this record. They stress that Pacific is seeking relief here because it knows, from past experience, that the California Commission would not approve of Golden Gate's proposed financial structure, referring to the rejection by the California Commission of a proposed transfer in 1952 to an experienced operator of the Marin County operations on the ground that the proposed financial structure, involving the contribution of $200,000 by the operator, was inadequate. They urge that, although Pacific now asserts that the "local" operations constitute one geographic and economic unit distinct and separate from the intercity operations, it significantly decided against transferring all the "local" operations in 1952 and instead sought to transfer only the Marin County operations. These protestants submit that if the State Commission's rate-making policies are illegal, Pacific has an adequate remedy in the courts, of which is has not availed itself in connection with prior rate decisions of the California Commission. With respect to applicants' allegation that rate proceedings before that Commission have in the past been protracted, they point to adjournment requests by Pacific in the proceedings determined in 1954, and cite one instance in which a new application in 1950 was consolidated with pending proceedings, prior to de-

termination of which an interim or emergency fare increase was granted.

[fol. 31] The Union argues in its exceptions that the proposed report should have found that employees would be adversely affected by the transaction. It adds that, after careful study, the California Commission has concluded that the Marin County operations cannot be placed on a profitable basis merely by a fare increase, that it is evident that that Commission would not authorize substantially increased fares in the "local" operations, after separation, and even if such increases were permitted, any expected increase in revenues would be tempered by the loss of traffic resulting from any sharp increase in fares.

The phrase "consistent with the public interest" is broad in scope, as repeatedly stated by the courts, and we are plainly charged with the obligations, while keeping in mind the national transportation policy, of considering all matters of every character affecting the public interest which may result from a proposed transaction, including the weighing of prospective benefits to the public against any disadvantages which might be expected to result. However, our province is not to determine whether some plan other than the one proposed might be more advisable. Our function is to determine whether the plan presented will be consistent with the public interest, although we may require modification of the plan or impose conditions where necessary in the public interest.

While our policy has been to encourage corporate simplification, this policy should not be invoked so as to cause the impractical retention in a single entity of highly dis-
[fol. 32] similar operations, as here, especially if such retention causes the undesirable results shown by this record. As previously stated, the "local" and intercity services are different with respect to the nature of the service provided, the type of passengers carried, the mileage involved, and the type of equipment utilized. Pacific's public relations have suffered because of its difficulties with respect to its "local" operations, and its management has had to devote more time and energy to those operations than are commensurate with the comparative

traffic and revenue producing results of this service. It is also apparent that in the past the commutation services have been conducted at considerable losses, which have had to be borne from profits obtained from Pacific's system operations to the prejudice of its long-haul operations, and that even under the recent fare increase the "local" operations are not expected to produce revenues equalling the cost of providing the service. That increase, as explained by the California Commission, is expected to reduce anticipated losses on the Marin County operations, during the year ending June 30, 1955, by only about 22 percent.

As contended by applicants, we may not properly overlook the burden on the interstate operations of Pacific which the proposed transaction would alleviate. A new corporation, with a completely separate management experienced in "local" mass transportation, will be able to confine its attention to that service and thus conduct those operations more efficiently than the present management, whose main interests are concerned with the long-haul operations. At the same time, Pacific's management will [fol. 33] be relieved of the necessity of conducting two dissimilar services, enabling it to concentrate exclusively on its inter-city operations. This is especially important in view of the decline in Pacific's long-haul traffic, both interstate and intrastate. The same service now rendered would be provided by Golden Gate, and the same facilities would be available. While, as pointed out by the Union, commuters would not be permitted the option of riding on Pacific's through buses in the Marin County and Peninsula areas, very little commuter traffic has been handled on these through trips. However, as previously shown, interstate passengers would, as now, have the option of riding on either intercity or "local" buses where the routes coincide, and a joint fare arrangement would facilitate trasnfers of passengers at connecting points. As Golden Gate's management would be more familiar with local conditions and more disposed to study the particular needs of its patrons, the probabilities of adjustments to provide better service and eliminate causes of any existing complaints

would be increased. Ultimate integration into the contemplated rapid transit system should be facilitated.

Under the circumstances here, the soundness of Golden Gate's financial structure under the proposed financing is questionable. It is not our function in this proceeding to determine the justness and reasonableness of the intrastate fares in question or the lawfulness of the policies of the California Commission. Neither shall we attempt to prophesy the future action of that body in its rate proceedings. The amount of interstate traffic to be transported by Golden Gate would produce an estimated 5.7 percent of its total revenues, and less than 20 percent of [fol. 34] this amount would be the result of a service by Golden Gate which could not also be provided by Pacific. Thus Golden Gate would essentially be a "local" operation and, as we shall find that the separation would be consistent with the public interest, the question as to the fares to be charged is one to be determined by the local authorities. However, as it appears that, if Golden Gate had conducted the "local" operations during the year 1953, it would have had a deficit of approximately $150,000, assuming that the estimated additional revenue of $84,000 from the fare increase would decrease the expected deficit of $234,300 by that amount, and as it would be obliged to incur equipment and other obligations, we are of the opinion that the contemplated cash investment in Golden Gate by Pacific of $150,000 is insufficient, and that $250,000 would be more appropriate to its needs. Our findings will be conditioned accordingly.

The Union's concern as to the adverse effects of the separation on employees seems unwarranted. Applicants have stated that there will be no loss of employment, and that existing terms and conditions of employment, seniority rights, pension, welfare, insurance, and hospital plans, and other benefits accorded to Pacific's employess would be extended to Golden Gate's employees. However, the Union has persisted in its opposition. Our approval of the transaction is with the expectation that applicants and the Union will make very effort to reach an agreement to protect all employees of Pacific and Golden Gate affected by the transaction, so that they will not be placed

in any worse position than may be required by the exigencies of the situation. To insure such protection, our findings will be conditioned to reserve jurisdiction for a period of 2 years from date of consummation to make such additional findings and to impose such terms and conditions with respect to all employees of Pacific and Golden Gate as may be necessary to protect their interests. [fol. 35] As previously mentioned, at the hearing Pacific's vice president in charge of operations rejected the suggestion made by the California Commission in its letter of March 13, 1954, that we should impose a condition requiring Pacific to take back Golden Gate's operations if and when ordered to do so by either this Commission or the California Commission. However, at the oral argument, counsel referred to a letter dated April 7, 1954, prior to the hearing, wherein Pacific's president stated that it would agree that, within a specified period, it would take back Golden Gate's operations upon our order, after hearing. We doubt the wisdom of approving such a transaction as this on an experimental basis. Also the problems which would be attendant upon the possible entry of such a mandatory order, such as the necessity for periodic inspection of Golden Gate's books and appraisal of its operations and financial condition to decide whether the proceeding should be reopened for hearing to determine whether such an order should be entered directing a reunification of the operations, make such a condition of doubtful practicability. We are of the opinion that the question of possible future reunification of these operations is one which properly should be left to applicants' management.

The proposed plan contemplates the holding of duplicating operating rights by both carriers. As previously mentioned, as long as it may continue to serve San Francisco in its long-haul operations, Pacific would accept any restriction that might be imposed to limit its service over the coinciding routes, and applicants specifically suggest a condition requiring cancellation of all duplicating interstate operating rights of Golden Gate. It might be noted, however, that any restriction on Pacific's authority [fol. 36] to serve intermediate points, but with Golden

Gate authorized to serve those points; might react to the detriment of long-haul passengers who would be compelled to use Golden Gate and change buses. Also, while any lack of authority in Golden Gate to operate in interstate commerce over the duplicating routes would not be of too great significance, so far as the traveling public is concerned, retention of such authority would enable some intercity passengers to use the equipment of either Pacific or Golden Gate, and, in addition, would provide Golden Gate with some additional revenue. We are therefore of the opinion that the holding of authority to provide duplicating service may, in this instance, be found to be consistent with the public interest.

We find, in No. MC-F-5643, that acquisition by Pacific Greyhound Lines of control of Golden Gate Transit Lines through ownership of capital stock, the contemporaneous purchase by Golden Gate Transit Lines of the presently-described operating rights and property of Pacific Greyhound Lines, and the acquisition by The Greyhound Corporation of control of Golden Gate Transit Lines, and of the operating rights and property through the transaction, upon the terms and conditions set forth herein, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a), and will be consistent within the public interest, and that, if the transaction is consummated, Golden Gate Transit Lines will be entitled to a certificate covering the said portions of the operating rights granted in No. MC-1511 and subnumbered proceedings as specifically set forth in appendix A hereto; *provided, however,* that if the authority herein granted is exercised, the amount of the cash payment to be made by Pacific Greyhound Lines to Golden [fol. 37] Gate Transit Lines shall be $250,000; *provided further* that, if the authority herein granted is exercised, the authority of Pacific Greyhound Lines to operate, over an alternate route, between Danville and Dublin, Calif., over California Highway 21 shall be cancelled; *provided, further,* that, if the authority herein granted is exercised, Golden Gate Transit Lines, shall amortize in equal monthly amounts over a maximum period of three years, commencing with the date of consummation of the purchase,

the amount assigned to its "Other Intangible Propery" account as a result of the transaction, or, in lieu of amortization in any month of the three year period, it may write off the unamortized balance of the maount so assigned, and Pacific Greyhound Lines shall immediately write off the excess, if any, of the consideration paid over the net book value of the stock of Golden Gate Transit Lines, which it would acquire, excluding intangibles, as of the date of consummation, such amortization and write-off to be accomplished in the manner to be determined upon submission of a statement showing all expenditures and the accounting proposed to record the transaction as required by our order herein; and *provided, further*, that, if the authority herein granted is exercised, jurisdiction shall be reserved for a period of 2 years from the date the transaction is consummated in order to make such additional findings and to impose such terms and conditions with respect to employees of Pacific Greyhound Lines and of Golden Gate Transit Lines, as may be necessary and lawful, if, upon petition by any of the said employees or their representatives, within that period, it is shown that the conditions of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done pursuant to, or as [fol. 38] direct result of, the consummation of the transaction under the authority herein granted; and that consummation of the transaction by applicants will be considered acceptance of the said reservation of jurisdiction.

We further find, in No. MC-1511 (Sub-No. 103), that, in connection with the transaction herein authorized, the public convenience and necessity require the continuance by Pacific Greyhound Lines of its operations in interstate or foreign commerce as a common carrier by motor vehicle, of passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers, between the termini, over the routes, and to and from the intermediate points specified in appendix B hereto; that Pacific Greyhound Lines is fit, willing and able properly to perform such service; and that, upon consummation of the transaction herein authorized, and upon compliance

with sections 215 and 217 of the act and the rules, regulations, and requirements thereunder, it will be entitled to a certificate of public convenience and necessity authorizing such operations.

An appropriate order will be entered.

COMMISSIONER HUTCHINSON, being necessarily absent, did not participate in the disposition of these proceedings.

[fol. 39] APPENDIX A TO EXHIBIT "A"

Interstate operating rights of Pacific Greyhound Lines to be acquired by Golden Gate Transit Lines under the findings in the report. All authority is over regular routes in California, in both directions, serving all intermediate points, unless otherwise noted.

Passengers, and their baggage, and express, mail, and newspapers, in the same vehicle with passengers,

MARIN COUNTY ROUTES

Between Novato and San Francisco:

From Novato, over U. S. Highway 101 to San Francisco.

Between San Rafael and Corte Madera Road Junction:

From San Rafael, over unnumbered highway via San Anselmo and Corte Madera to junction U. S. Highway 101 (Corte Madera Road Junction).

Between Inverness and San Anselmo:

From Inverness, over unmarked county highway to junction California Highway 1 (Point Reyes Station), thence over unnumbered highway to Fairfax, thence over Sir Francis Drake Boulevard to San Anselmo.

Between Kentifeld Corners and Greenbrae:

From junction unnumbered highways north of Kentfield (Kentifeld Corners), over Sir Francis Drake Boulevard to junction U. S. Highway 1 (Greenbrae).

Between Mill Valley and Manzanita:

From Manzanita over unnumbered highway to Alto, thence over Blithedale Avenue and Throckmortion Street to Mill Valley.

Between Mill Valley and Tamalpais High School:

From Tamalpais High School over Miller Avenue to Mill Valley.

Between Alto and Belvedere:

From Alto over Alto Highway to Tiburon Wye, thence over unnumbered highway to Belvedere.

Between Belvedere Junction and Tiburon:

From junction unnumbered highways northwest of Belvedere (Belvedere Junction), over unnumbered highway to Tiburon.

[fol. 40] Between Tamalpais Valley Junction and Bolinas:

From Tamalpais Valley Junction over California Highway 1 to Dias Ranch, Calif., thence over unnumbered highway (known as Panoramic Highway), to junction unnumbered highway (known as Frank Valley Road), approximately 0.8 miles north of Dias Ranch, thence over unnumbered highway (Frank Valley Road) to Muir Beach Junction, thence over California Highway 1 to junction unnumbered highway, about 2 miles northwest of Stinson Beach, thence over unnumbered highway to Bolinas.

Between Stinson Beach and Muir Woods Junction:

From Muir Woods Junction over unnumbered highway through Bootjack, to Stinson Beach.

Between Waldo Junction and Fort Baker Junction:

From junction unnumbered highway and U. S. Highway 101 northwest of Sausalito, over unnumbered highway via Sausalito to junction U. S. Highway 101 (Fort Baker Junction).

CONTRA COSTA COUNTY ROUTES

Between San Francisco and Antioch:

From San Francisco over the San Francisco-Oakland Bay Bridge to Oakland, thence over California Highway 75 to Concrod, thence over California Highway 24 to Willow Pass Junction, thence over California Highway 4 to Antioch.

Between Berkeley and Temescal Junction:

From Berkeley over California Highway 24 to Temescal Junction.

Between Martinez and Accalanes Junction:

From Martinez over Pleasant Hill Road to junction California Highway 24 (Accalanes Junction).

Between Walnut Creek and Danville:

From Walnut Creek over California Highway 21 to Danville.

Between Concord and Port Chicago:

From Concord, over unnumbered highway via Clyde, to Port Chicago.

Between Port Chicago and Willow Pass Junction:

From Port Chicago, over unnumbered highway to Willow Pass Junction.

[fol. 41] Between Pittsburg and Concord:

From Pittsburg, over unnumbered highway, (commonly known as Donovan Road) to junction unnumbered highway (commonly known as Marsh Creek Road), thence over Marsh Creek Road to Concord.

PENINSULA ROUTES

Between San Francisco and San Mateo:

From San Francisco, over U. S. Highway 101 to San Mateo.

Between San Francisco and Bellhaven:

From San Francisco over By-Pass U. S. Highway 101 to junction unnumbered highway north of South San Francisco (Freeway Junction), thence over said unnumbered highway via South San Francisco and San Francisco International Airport to junction By-Pass U. S. Highway 101 (Airport Overpass), thence over said ByPass U. S. Highway 101 to junction Willow Road (Bellhaven).

Between Freeway Junction and Airport Overpass, via Freeway:

From junction ByPass U. S. Highway 101 and unnumbered highway north of South San Francisco (Freeway Junction), over said ByPass U. S. Highway 101 to junction unnumbered highway southwest of San Francisco International Airport (Airport Overpass), serving no intermediate points, for operating convenience only.

Between San Bruno Junction and San Bruno:

From junction By-Pass U. S. Highway 101 and unnumbered highway east of San Bruno (San Bruno Junction), over unnumbered highway to junction U. S. Highway 101 (San Bruno).

Between San Francisco and Half Moon Bay, over California Highway 1.

Between San Mateo and Palo Alto, over U. S. Highway 101.

Between East San Mateo and San Mateo Junction:

From junction of Third Avenue and By-Pass U. S. Highway 101 (East San Mateo), over Third Avenue to Delaware Street, thence over Delaware Street to Fourth Avenue, thence over Fourth Avenue to junction U. S. Highway 101 (San Mateo Junction).

[fol. 42] Between Bellhaven and Palo Alto:

From junction By-Pass U. S. Highway 101 and unnumbered highway north of Palo Alto (Bellhaven),

over said unnumbered highway to junction U. S. Highway 101 (Palo Alto), for operating convenience only, serving no intermediate points.

[fol. 43] APPENDIX B TO EXHIBIT "A"

Operating authority to be granted in No. MC-1511 (Sub-No. 103) to Pacific Greyhound Lines to transport, over regular routes:

Passengers and their baggage, and express, mail, and newspapers, in the same vehicle with passengers.

MARIN COUNTY ROUTES

Between Novato, Calif., and San Francisco, Calif., over U. S. Highway 101:

Serving all intermediate points.

CONTRA COSTA COUNTY ROUTES

Between Port Chicago, Calif., and Antioch, Calif.:

From Port Chicago, over unnumbered highway via Willow Pass Junction and Pittsburg to Antioch, and return over same route.

Between Martinez Junction, Calif., and Camp Stoneman, Calif.:

From Martinez Junction, over California Highway 4 via Concord Junction and Camp Stoneman Junction to Camp Stoneman, and return over same route, to be operated as an alternate route.

Between Antioch, Calif., and Pittsburg, Calif.:

From Antioch, over California Highway 4 to Camp Stoneman, thence over unnumbered highway to Pittsburg, and return over same route.

Between San Francisco, Calif., and Oakland, Calif.:

From San Francisco, Calif., over the San Francisco-Bay Bridge to Oakland, Calif., and return over the same route.

Serving all intermediate points.

PENINSULA ROUTES

Between San Francisco, Calif., and Bellhaven, Calif.:

From San Francisco over By-Pass U. S. Highway 101 to junction unnumbered highway north of South San Francisco (Freeway Junction), thence over said unnumbered highway via South San Francisco and San Francisco International Airport to junction By-Pass U. S. Highway 101 (Airport Overpass), thence over said By-Pass U. S. Highway 101 to junction Willow Road (Bellhaven), and return over the same route.

[fol. 44] Between San Francisco, Calif., and Half Moon Bay, Calif., over California Highway 1.

Between Crystal Springs Dam, Calif., and Half Moon Bay, Calif., over Highway 5.

Immediately above-described routes (2), restricted to service during the period extending from approximately June 10 to September 10 of each year.

Between San Mateo, Calif., and Palo Alto, Calif., over U. S. Highway 101.

Between East San Mateo, Calif., and San Mateo Junction Calif.:

From junction of Third Avenue and By-Pass U. S. Highway 101 (East San Mateo), over Third Avenue to Delaware Street, thence over Delaware Street to Fourth Avenue, thence over Fourth Avenue to junction U. S. Highway 101 (San Mateo Junction).

Between Bellhaven, Calif., and Palo Alto, Calif.:

From junction By-Pass U. S. Highway 101 and unnumbered highway north of Palo Alto (Bellhaven) over said unnumbered highway to junction U. S. Highway 101 (Palo Alto).

Serving all intermediate points on all of the above-described routes.

Between Freeway Junction and Airport Overpass, via Freeway:

From junction By-Pass U. S. Highway 101 and unnumbered highway north of South San Francisco (Freeway Junction), over said By-Pass U. S. Highway 101 to junction unnumbered highway southwest of San Francisco International Airport (Airport Overpass), and return over the same route, serving no intermediate points, for operating convenience only.

The above so-called MARIN COUNTY ROUTES, as well as the PENINSULA ROUTES, are proposed to be used in conjunction with applicants' authorized operations between Portland, Oreg., and Lordsburg, N. Mex., as described on sheets 2 and 3 of certificate No. MC-1511 dated November 22, 1950. The CONTRA COSTA COUNTY ROUTES are proposed to be used in conjunction with authorized operations from Borden Junction over Byron Avenue to Byron, thence over Kellogg Road to Marsh Corners, thence over Marsh Creek Road to Concord, thence over California Highway 24 (formerly California Highway 75) to Oakland, and return, as described on sheet 14 of certificate No. MC-1511, dated November 22, 1950. In addition, the Marin County and Peninsula Routes will connect at San Francisco and the Contra Costa Routes will connect at Oakland, with the following authorized opera-
[fol. 45] tions as described on the sheets indicated in certificate No. MC-1511, dated November 22, 1950. Sheet 4—Between Salt Lake City, Utah, and San Francisco, Calif., over U. S. Highway 40. Sheet 5—Between San Francisco, Calif., and Stockton, Calif., over U. S. Highway 40, Alternate U. S. Highway 40, unnumbered highway, and California Highway 4. Sheet 8—Between San Francisco, Calif., and Stockton, Calif., over U. S. Highway 50. Sheet 8—Between San Francisco, Calif., and North Hayward, Calif., over U. S. Highway 50 and unnumbered highway.

[fol. 46] EXHIBIT "B" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of July, A. D. 1955.

No. MC-F-5643

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

Investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That acquisition by Pacific Greyhound Lines, of San Francisco, Calif., of control of Golden Gate Transit Lines, also of San Francisco, through ownership of capital stock, and for the contemporaneous purchase by Goldn Gate Transit Lines of certain operating rights and property of Pacific Greyhound Lines, and acquisition by The Greyhound Corporation, of Chicago, Ill., of control of Golden Gate Transit Lines, and of the operating rights and property through the transaction, be, and they are hereby approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That, if the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215 and 217 of the Interstate Commerce Act, and with rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That, if the authority herein granted is exercised, Pacific Greyhound Lines and Golden Gate Transit Lines shall submit for consideration and approval,

a sworn statement and one copy thereof showing all expenditures made, by dates, or to be made, in connection with the transactions authorized, including the consideration, legal and other fees, commissions, and any other cost incidental to the transaction, the assets acquired, and the liabilities assumed, indicating the account number and title to which each item has been, or is to be debited or credited.

It is further ordered, That the authority herein granted shall not be exercised prior to the effective date hereof, and that this order shall be effective on August 24, 1955.

It is further ordered, That unless the authority herein granted is exercised within 180 days from the effective date hereof, this order shall be of no further force and effect.

[fol. 47] *And it is further ordered*, That recital in said report of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 48] EXHIBIT "C" TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of September, A. D. 1955.

No. MC-F-5643

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

No. MC-1511 (Sub-No. 103)

PACIFIC GREYHOUND LINES, EXTENSION—
SAN FRANCISCO, CALIF.

Upon consideration of the record in the above-entitled proceedings, and of:

1. Petitions of (a) Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Divisions 1055, 1222, 1223, 1225 and 1471, and (b) the Counties of Marin and Contra Costa, California, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association, protestants, for rehearing and reconsideration of the report and order of July 6, 1955; and

2. Applicants' reply to the petitions; and

It appearing, That the petitions do not present any facts or arguments which warrant reopening the proceedings for rehearing or reconsideration:

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission.

Harold D. McCoy, Secretary.

(Seal)

[fol. 49] EXHIBIT "D" TO COMPLAINT

ORDER

INTERSTATE COMMERCE COMMISSION

No. MC-F-5643

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

In the matter of a further postponement of the effective date of the order of July 6, 1955.

PRESENT:

Hugh W. Cross, Chairman, to whom the above-entitled matter has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding, and of a request on behalf of the protesting counties and commuter associations for a further postponement of the effective date of the order of July 6, 1955, to allow time to seek judicial review in the event the petitions for rehearing and reconsideration are denied, and it appearing that the said petitions were denied on September 19, 1955; and good cause therefor appearing:

It is ordered, That the effective date of the said order of July 6, 1955, be, and it is hereby, further postponed to October 19, 1955.

Dated at Washington, D. C., this 27th day of September, A. D. 1955.

By the Commission, Chairman Cross.

Harold D. McCoy, Secretary.

(Seal)

[fol. 50] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed December 15, 1955

Come now the United States of America and the Interstate Commerce Commission, defendants, and in answer to the Complaint:

I.

Admit the allegations contained in Paragraph I, except that they neither admit nor deny for lack of knowledge the allegations that the members of the Contra Costa County Commuters Association and the commuter organizations composing the Marin County Federation of Commuter Clubs regularly use the bus service of Pacific Greyhound Lines.

II.

Admit the allegations contained in Paragraph II, except those concerning the status of Pacific Greyhound Lines under Section 226 of the Public Utilities Code of the State of California, which are legal conclusions not requiring an answer, and the allegations in the last two sentences, which the defendants neither admit nor deny for lack of knowledge. The defendants do admit that the principal operations of Golden Gate Transit Lines will be local bus service within the metropolitan area surrounding San Francisco Bay.

[fol. 51]

III.

Answering the allegations contained in Paragraph III, the defendants admit that Golden Gate Transit Lines is a corporation organized under the laws of the State of

California on May 7, 1953, that it engages in no business activities, and that it has not conducted motor carrier operations.

IV.

Admit the allegations contained in Paragraphs IV through VII.

V.

Admit the allegations contained in Paragraph VIII, but respectfully refer the Court to the plaintiffs' petition for rehearing and reconsideration for a complete statement of the grounds relied upon therein by the plaintiffs.

VI.

Admit the allegations contained in the first two sentences of Paragraph IX. The remaining allegations do not require an answer.

VII.

Deny the allegations contained in Paragraph X.

VIII.

For further answer to the allegations contained in the Complaint, the defendants deny that the action of the Interstate Commerce Commission challenged herein is unlawful for the reasons specified in the Complaint or for any other reason whatsoever. The defendants aver that the action of the Commission is fully supported and justified by the record and that in taking such action the Commission carefully considered the National Transportation Policy and considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to the proceedings by their respective counsel; and that said action was not arbitrary, unjust or contrary to law.

[fol. 52]

IX.

Except as herein expressly admitted, the defendants deny each and every allegation contained in the Complaint.

WHEREFORE, the defendants pray that the relief prayed for in the Complaint be denied, and that the Complaint be dismissed, plaintiffs to pay the costs.

Stanley N. Barnes, Assistant Attorney General;

s/ Lloyd H. Burke, United States Attorney, by s/ Wm. B. Spohn, Asst. U. S. Attorney; s/ James E. Kilday; s/ John H. D. Wigger, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for the United States.

s/ Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for the Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 53] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTER CLUBS, CONTRA COSTA COUNTY COMMUTERS ASSOCIATION, and AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, Divisions 1055, 1222, 1223, 1225, and 1471, Plaintiffs,

v.

United States of America and Interstate Commerce Commission, Defendants,

Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Applicants for Intervention.

MOTION OF GOLDEN GATE TRANSIT LINES, ET AL. TO INTERVENE AS DEFENDANTS—Filed December 29, 1955

[fol. 54] Applicants, Golden Gate Transit Lines, a corporation, Pacific Greyhound Lines, a corporation, and The Greyhound Corporation, a corporation (hereinafter sometimes referred to as "Golden Gate", "Pacific", and "Greyhound", respectively), move the Court for leave to intervene as defendants in this action, in order to assert the defenses set forth in their proposed motion to dismiss, of which a copy is hereto attached and by this reference made a part hereof, upon the ground that applicants were parties in interest, and each of them was a party in interest, having been applicants in the proceedings before the Interstate Commerce Commission referred to in the complaint herein, said proceedings being entitled: "The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (portion)—Pacific Greyhound Lines, Docket No. MC-F-5643", and "Application of Pacific Greyhound Lines for a certificate of public convenience and necessity over certain routes in California, Docket No. MC-1511 (Sub-No. 103)." In said proceedings the Interstate Commerce Commission made its order dated July 6, 1955, a copy of which is attached to the complaint herein as Exhibit B, and which order the plaintiffs pray by their complaint herein to have this Court permanently suspend, enjoin, ammul, (sic) and set aside. As appears from the report of the Interstate Commerce Commission in said proceedings, a copy of which is attached to the complaint herein as Exhibit A, the interests of applicants, and of each of them, are involved in this action. By reason of the premises applicants have an unconditional right to intervene herein under the provisions of Title 28 U.S.C.A. Section 2323, and make this motion for leave to intervene as of right.

Dated December 29th, 1955

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California; Douglas Brookman, 1815 Mills Tower, San

Francisco 4, California; Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Applicants for Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[File endorsement omitted]

[fol. 55] Proposed Motion of Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, Intervening Defendants, to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

(Omitted. Printed side page 78, infra.)

[fol. 57] Notice of Motion of Intervening Defendants' Motion to Dismiss Complaint.

(Omitted. Printed side page 97, infra.)

[fol. 59] Memorandum of Points and Authorities in Support of Motion of Intervening Defendants to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

(Omitted. Printed side page 84, infra.)

[fol. 69] Draft of Judgment of Dismissal Proposed by Intervening Defendants, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, Filed Pursuant to Rule 12(b) of the Rules of the United States District Court for the Northern District of California.

(Omitted. Printed side page 81, infra.)

[fol. 71] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF MOTION OF GOLDEN GATE TRANSIT LINES ET AL. TO INTERVENE—Filed December 29, 1955

[fol. 72] To:

Spurgeon Avakian, W. O. Weissich, Francis W. Collins, Financial Center Building, Oakland 12, California; Jack Robertson, Keating Building, Menlo Park, California, Attorneys for Plaintiffs.

Robert Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D.C., Attorney for Defendant, Interstate Commerce Commission; Stanley N. Barnes, James E. Kilday, John H. D. Wigger, Department of Justice, Washington 25, D.C.;

Lloyd H. Burke, United States Attorney, Post Office Building, Seventh and Mission Streets, San Francisco, California, Attorneys for Defendant, The United States of America.

You will please take notice that on Monday, January 9, 1956 at 9:30 o'clock A.M. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Master Calendar Judge, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, applicants for intervention will bring on for hearing before the above entitled Court the aforesaid motion to intervene as defendants.

Dated at San Francisco, California, December 29, 1955.

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California.

Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The

Greyhound Corporation, Applicants for Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[File endorsement omitted]

[fol. 73] Certificate of Service by Mail of Motions to Intervene and to Dismiss Complaint (omitted in printing)

[fol. 75] In the United States District Court for the Northern District of California, Southern Division

[Title omitted]

Order Granting Motion to Intervene as Defendants—January 9, 1956

[fol. 77] In United States District Court

Order Designating United States Circuit Judge and United States District Judges Pursuant to Section 2284 of the United States Code—January 12, 1956

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of Section 2284 of Title 28, United States Code, do hereby designate and appoint the

Honorable William Healy,

United States Circuit Judge for the Ninth Judicial Circuit, and the

Honorable George B. Harris,

United States District judge for the Northern District of California, and the

Honorable Oliver J. Carter,

United States District Judge for the Northern District of California, and to hold the District Court for the North-

ern District of California at San Francisco, California, at such time as may be agreed upon by the judges, and to hear and determine the following case: County of Marin, et al., v. United States of America, et al., and Golden Gate Transit Lines, et al., intervenors. Civil No. 34985, and all motions and proceedings therein.

Dated at San Francisco, California, this 12th day of January, 1956.

William Denman, Chief Judge, United States Court of Appeals, Ninth Circuit.

[File endorsement omitted]

[fol. 76] The motion of applicants for intervention, Golden Gate Transit Lines, Pacific Greyhound Lines and the Greyhound Corporation, to intervene herein as defendants, pursuant to Title 28 U.S.C.A. §2323 having come on for hearing before the Honorable Oliver J. Carter on January 9, 1956, upon the said motion and the complaint herein, and the moving parties having appeared by Allan P. Matthew, Esq., their attorney, and no party having appeared in opposition to said motion, and the said motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said motion to intervene as defendants should be granted;

Now, Therefore, It Is Hereby Ordered that the motion of Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation to intervene as defendants by and it is hereby granted and said intervening defendants by and they are hereby granted leave to file a motion to dismiss the complaint in, or substantially in, the form of the proposed motion to dismiss complaint attached to said motion to intervene as defendants.

Done In Open Court this 9th day of January, 1956.

Oliver J. Carter, Judge.

Approved as to form, as provided in Rule 21, Rules of the United States District Court for the Northern District of California.

County of Marin, et al., Plaintiffs, By Spurgeon Avakian, Their Attorney.

United States of America and Interstate Commerce Commission, Defendants, By Lloyd H. Burke, United States Attorney; William B. Spohn, Assist. U.S. Atty.

[File endorsement omitted]

[fol. 78] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MOTION OF GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES AND THE GREYHOUND CORPORATION, INTERVENING DEFENDANTS, TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED —Filed January 23, 1956

Intervening defendants, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, [fol. 79] pursuant to leave of Court first had and obtained, move the Court to dismiss the complaint herein, pursuant to Rule 12(b), Federal Rules of Civil Procedure.

This motion is based upon the complaint herein and the report and order of the Interstate Commerce Commission dated July 6, 1955, copies of which are attached to the complaint as Exhibits A and B. Said report and order were made in the proceedings before the Interstate Commerce Commission referred to in the complaint herein, said proceedings being entitled: "The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (Portion)—Pacific Grey-

hound Lines, Docket No. MC-F-5643", and "Application of Pacific Greyhound Lines for a certificate of public convenience and necessity over certain routes in California, Docket No. MC-1511 (Sub-No. 103)."

This motion is made upon the ground that the complaint fails to state a claim upon which relief can be granted to plaintiffs or any of them in that the Interstate Commerce Commission, by its said report and order dated July 6, 1955 entered in said proceedings, Docket No. MC-F-5643 and Docket No. MC-1511 (Sub-No. 103), as aforesaid, approving and authorizing the transaction for which authority was sought therein, properly found that the transaction is within the scope of Section 5(2)(a) of the Interstate Commerce Act (Title 49 U.S.C.A. Section 5(2)(a)), and, in particular, that the proposed transfer of certain properties and operating rights from Pacific to Golden Gate, and the acquisition of control of Golden Gate by Pacific through ownership of the former's capital stock, and the acquisition of concurrent control of Golden Gate by Greyhound through Pacific, could be accomplished by authority of an order of the Interstate Commerce Commission and not otherwise. [fol. 80] Wherefore, these intervening defendants pray that the complaint herein be dismissed with prejudice and that these intervening defendants have and recover their costs of suit incurred, and to be incurred, herein.

Dated January 20, 1956.

Allan P. Matthew; Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California; Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 81] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

DRAFT OF JUDGMENT OF DISMISSAL PROPOSED BY INTERVENING DEFENDANTS, GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES AND THE GREYHOUND CORPORATION, FILED PURSUANT TO RULE 12(b) OF THE RULES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

[fol. 82] Judgment of Dismissal

The motion of intervening defendants Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation to dismiss the complaint herein pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure having come on for hearing before the Court of three judges specially constituted pursuant to Title 28 U.S.C.A. Section 2284 on ....., 1956 upon the said motion and the complaint herein and upon the report and order of the Interstate Commerce Commission dated July 6, 1955 made in the proceedings before the Interstate Commerce Commission entitled: "The Greyhound Corporation—Control; Pacific Greyhound Lines—Control; Golden Gate Transit Lines—Purchase (Portion)—Pacific Greyhound Lines, Docket No. MC-F-5643", and "Application of Pacific Greyhound Lines for a certificate of public convenience and necessity over certain routes in California, Docket No. MC-1511 (Sub-No. 103)", and the plaintiffs having appeared in opposition to said motion by ....., Esq., their attorney(s), and the moving parties having appeared by Allan P. Matthew, Esq., their attorney, and the motion having been heard and considered by the Court, and submitted to the Court for decision, and it appearing to the Court that said motion of intervening defendants to dismiss the complaint herein should be granted and that said complaint should be dismissed with prejudice;

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the complaint herein be and it is hereby dis-

missed with prejudice; that the plaintiffs be, and each of [fol. 83] them is, hereby denied all relief against said intervening defendants; and that said intervening defendants do have and recover from plaintiffs their costs herein, taxed in the amount of $.....

Done In Open Court this .....day of ....., 1956.

.....
Judge

.....
Judge

.....
Judge

[fol. 84] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF INTERVENING DEFENDANTS TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED—Filed January 23, 1956

[fol. 85] Statement of the Case

The complaint herein seeks annulment of an order of the Interstate Commerce Commission, entered upon the joint application of the defendants in intervention under Section 5(2) of the Interstate Commerce Act, authorizing (a) Pacific Greyhound Lines to transfer certain properties and operating rights to Golden Gate Transit Lines, (b) the acquisition of control of Golden Gate Transit Lines by Pacific Greyhound Lines through ownership of capital stock and (c) control of Golden Gate Transit Lines by The Greyhound Corporation through Pacific Greyhound

Lines. Copies of the report and order of the Commission are annexed to the complaint as Exhibits A and B, respectively.

Pacific Greyhound Lines is a common carrier of passengers by motor vehicle in both interstate and intrastate commerce, in the seven western states; The Greyhound Corporation controls Pacific Greyhound Lines through ownership of a majority of its capital stock; and Golden Gate Transit Lines is a newly organized corporation authorized by its articles to engage in the transportation of passengers by motor vehicle. Golden Gate Transit Lines is not presently an operating common carrier, but it will become such upon consummation of the transaction authorized by the Commission's order. The operating rights to be transferred from Pacific Greyhound Lines to Golden Gate Transit Lines include both intrastate and interstate services, and comprehend local operations for distances up to 25 or 30 miles in the San Francisco Bay area, styled by the Commission "commuter operations". (Exhibit A, Sheet 4)

For convenience, these three corporations will hereafter sometimes be styled "Pacific", "Greyhound", and "Golden Gate", respectively.

[fol. 86] The Issue

The complaint herein tenders a single issue, and this is an issue of law. The sole challenge directed to the Commission's order appears in paragraph X of the complaint which, tersely summarized, alleges that the transactions described in the applications before the Commission and authorized by the Commission's order are not within the scope of Section 5 of the Interstate Commerce Act in that Golden Gate is not presently a "carrier", and that the Commission exceeded its jurisdiction in authorizing the transfer by Pacific of certain properties and operating rights to Golden Gate and the acquisition of control of Golden Gate by Pacific through ownership of capital stock. Such was plaintiffs' contention in opposing the applications before the Commission, and the Commission disposed of that issue in the following terms (Sheets 17-18, Exhibit A):

"The Union, the Counties, and the Commuter Associations collectively question the jurisdiction of this Commission over the proposed transaction under section 5 on the ground that Golden Gate is not a 'carrier' as defined in the act, that it must first acquire the status of a 'carrier' before jurisdiction attaches under section 5, and that the proposed transaction therefore, is not within the scope of section 5(2)(a)(i) which may be authorized. It is apparent that if the transaction were accomplished without our prior authority it would be in violation of section 5(4). Jurisdiction is determined on the basis of facts existing at consummation, and Greyhound proposes to acquire control of Golden Gate concurrently with its becoming a carrier through the purchase. Jurisdiction has been asserted in numerous similar cases and is clear under section 5. *Columbia Motor Service Co.—Purchase—Columbia Terms. Co.*, 35 M.C.C. 531. Jurisdiction over a transaction which is subject to section 5 is exclusive and plenary under the plain language of paragraph 11 of section 5, and, upon our approval of such a transaction, the applicants would have full power to 'carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority'."

The Commission's holding is plainly correct as we shall now undertake to show.

[fol. 87]

I.

The Commission's Jurisdiction to Approve or Disapprove a Proposed Transaction Under Section 5(2) of the Act Is to Be Determined Upon the Basis of Facts Which Will Exist Upon Consummation of the Transaction.

As heretofore noted, Golden Gate is not presently an operating common carrier. This is recognized in the following statement excerpted from Sheet 5 of the Commission's report:

"Golden Gate, which was incorporated on May 7, 1953, has engaged in no business activities and is not now a motor carrier".

Golden Gate could not engage in the services contemplated by the applications, nor could Pacific acquire control of Golden Gate by stock ownership, until authorized by the Commission. That the Commission's jurisdiction necessarily includes the exercise of its authority to these ends, including jurisdiction as to a carrier "resulting" from the transaction so authorized, is plainly declared by statutory provision as well as by all reported authority. We deal first with the statute.

The authority exercised by the Commission in the instant case is derived from Section 5(2)(a) of the Act, which provides, *inter alia*, that it shall be lawful, with the approval and authorization of the Commission,

> "for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; * * *"

Section 5(11) of the Act declares that

> "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in *or resulting from any transaction approved by the Commission thereunder*, shall have full power * * * to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority;" (Emphasis supplied)

[fol. 88] Thus the statute does not restrict the exercise of the Commission's jurisdiction to transactions between *existing common-carriers only*. On the contrary, the jurisdiction conferred by the statute expressly extends to any carrier or corporation "*resulting from any transaction approved by the Commission.*" It is plain that Golden Gate will be a carrier "resulting" from the transaction here approved by the Commission. Advisedly, and necessarily, Congress left no such hiatus in the Commission's authority as is here urged by plaintiffs.

Nothing beyond this is needed. In the absence of ambiguity in the statutory terms there is no occasion for resort to legislative history. It may be of some interest, nevertheless, to refer briefly to a significant feature of the legislative history of the Transportation Act of 1940 which brought the statutory provisions into their present form. The following appears in the second Conference Committee report on the Transportation Act of 1940, speaking of the bill (S. 2009) as finally passed:

> "The House amendment in section 8 and the Senate bill in section 49 provided for the revision of the provisions of section 5 of the Interstate Commerce Act relating to consolidations, mergers, acquisitions of control, etc., making such revised section apply to all types of carriers subject, *and proposed to be made subject*, to the Interstate Commerce Act. As a necessary incident, the repeal of section 213 (relating to unifications, etc., in case of motor carriers) was provided for." (House Report No. 2832, 76th Cong., 3rd Sess., Aug. 7, 1940, contained in 5 H. Misc. Reps., p. 68.) (Emphasis supplied)

Thus the legislative intent concurs with the statutory declaration.

The decisions of Court and Commission are in accord. In literally scores of cases the Commission has ruled in conformity with its ruling in the instant case, and judicial pronouncements are in no respect discordant therewith. The following are representative:

[fol. 89] *Commission Decisions*

Columbia Motor Service Co.—Purchase, 35 M.C.C. 531, 534 (1940)
Takin—Purchase, 37 M.C.C. 626, 627 (1941)
A. & W. Motor Lines—Purchase, 38 M.C.C. 407 (1942)
Interstate Motor Freight System, Inc.—Purchase, 39 M.C.C. 207; 208 (1943)
Hannon—Control, 39 M.C.C. 620, 622 (1944)
Transit, Inc.—Purchase, 50 M.C.C. 433, 434 (1948)

Baggett Transp. Co.—Purchase, 57 M.C.C. 690, 703 (1951)

Detroit and Cleveland Navigation Company—Control, 58 M.C.C. 599, 606 (1952)

Gehlhaus and Hollobinko—Control, 60 M.C.C. 167, 169 (1954)

Fox Purchase, 261 I.C.C. 95, 100 (1945)

Federal Barge Lines, Inc., 285 I.C.C. 439, 443-444 (1953)

Southern Pacific Company Reincorporation, 267 I.C.C. 523 (1947)*

Chicago Great Western Railway Company, et al., Reincorporation, etc., Finance Docket No. 19028 and No. 19029 (November 18, 1955)*.

Court Decisions

Pan American Airways Co. v. *Civil Aeronautics Board*, 121 F.2d 810 (C.A. 2d, 1941)

National Air Freight Forwarding Corp. v. *Civil Aeronautics Board*, 197 F.2d 384 (C.A.D.C., 1952)

Continental Southern Lines, Inc. v. *Civil Aeronautics Board*, 197 F.2d 397 (C.A.D.C., 1952) cert. den., 344 U.S. 831

General Transp. Co. v. *United States*, 65 F. Supp. 981, 984 (D. Mass., 1946) aff'd per curiam, 329 U.S. 668

[fol. 90] *Baggett Transp. Co.* v. *United States*, 116 F. Supp. 167, 170 (N.D. Ala., 1953)

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* The reports of the Commission in these proceedings plainly exemplify the jurisdictional void which would result from approval of the plaintiffs' contention in the instant proceeding. In both of these cases the Commission authorized transfer of the properties and operating rights of a carrier by rail to a newly organized Delaware corporation. According to the essential philosophy of the plaintiffs herein the orders of the Commission approving the transfer were void, and therefore state laws would not have been superseded by Section 5(11). But the transfers were made and the two "resulting" Delaware corporations are now operating as common carriers.

We need not comment upon the Commission decisions beyond observing that they consistently hold that jurisdiction exists in dealing with transactions of this immediate character. The Court decisions are fewer in number, and may be reviewed briefly at this point.

Section 408(a) of the Civil Aeronautics Act is virtually correlative with Section 5(2)(a) of the Interstate Commerce Act, both provisions being directed to a common objective.

In

Pan American Airways Co. v. *Civil Aeronautics Board,* 121 F.2d 810 (C.A. 2d, 1941)

issue was raised as to the authority of the Civil Aeronautics Board to authorize a newly organized corporation to engage in operations as an air carrier and to authorize control of such air carrier by American Export Lines, Inc., a common carrier by water. The Court of Appeals ruled that the necessary authority was in the Civil Aeronautics Board under Section 408(a). Speaking by Judge Augustus N. Hand the Court said:

> "The Board, with one of its members dissenting, dismissed the application upon the ground that Section 408(a)(5) 'applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier.' This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resources, with a certificate authorizing operation. Any other interpretation would enable a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) . . ." (p. 815)

Each of the decisions in

National Air Freight Forwarding Corp. v. *Civil Aeronautics Board,* 197 F.2d 384 (C.A.D.C., 1952)

[fol. 91] and

Continental Southern Lines, Inc. v. Civil Aeronautics Board, 197 F.2d 397 (C.A.D.C., 1952) cert. den., 344 U.S. 831

is in accord and expressly follows the *Pan American* decision.

In

General Transportation Co. v. United States, 65 F. Supp. 981 (D. Mass., 1946) aff'd per curiam, 329 U.S. 668

action was brought to set aside an order of the Interstate Commerce Commission approving the purchase of certain operating rights. The contention was that Hardy, the vendor, had abandoned his motor carrier operations prior to the date of the Commission's order authorizing the transfer of his operating rights to the vendee, and that the Commission therefore had no jurisdiction under Section 5(2)(a) to approve the application. However, the United States District Court for the District of Massachusetts found no merit in this contention inasmuch as the vendor's operating certificate had not been revoked at the time when the order of approval was issued. The Commission's jurisdiction was upheld notwithstanding that vendor, having abandoned his operations, no longer was precisely within the definition of a "common carrier by motor vehicle".

Compare

Baggett Transp. Co. v. United States, 116 F. Supp. 167 (N.D. Ala., 1953)

where the Court said:

> "It must be acknowledged that the jurisdiction of the Commission must arise from the Act of its own creation and is not one which it is free to exercise or abdicate ex proprio motu. This court must now assume the task of construing for itself the provisions of Section 5(2) of the Act, wherein all of the parties to this litigation agree that the grant of jurisdiction resides

> if, indeed, it does exist. That is not to say, however, that this section must be wrenched from its context and that the court should blind itself to the congres- [fol. 92] sional effort to integrate into the vast, national transportation scheme the fragmentary but essential operations of intrastate motor carriers." (p. 170)

It was held that the operations of a carrier engaged in intrastate and interstate commerce solely within a single state under the second proviso in Section 206(a) of the Interstate Commerce Act came within Section 5(2) of the Act and that such operating rights could not be transferred to another carrier without the approval and authorization of the Commission.

No judicial ruling or expression of contrary import has come to our attention.

II.

Acceptance of Plaintiffs' Contention Would Devitalize the Commission's Authority Under Section 5(2) of the Act in Important Respects and Would Afford a Means for Evasion of the Statutory Objective

If the exercise of the Commission's authority were confined to common carriers presently existing, excluding carriers "resulting" from transactions submitted for the Commission's approval, an ominous void in jurisdiction would be opened. This is recognized in the opinion of the Court of Appeals for the District of Columbia in *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, heretofore cited. Addressing itself specifically to the opportunity which would be afforded for successful evasion of the statutory objective, if the Commission's authority were to be so restricted, the Court said:

> "Since such a company is not an air carrier until a certificate has been issued, it would appear at first blush that its relationships to other types of carriers are not subject to the restriction of Sec. 408. It has been held, however; in Pan-American Airways Co. v. Civil Aeronautics Board, 2 Cir., 1941, 121 F.2d 810,

that the very process of certification brings the control relationships between the newly certificated air carrier [fol. 93] and its parent within Sec. 408. Otherwise a common carrier seeking entry into the air transportation field would be able to evade Sec. 408 merely by organizing a subsidiary and causing it to apply for a certificate of public convenience and necessity under Sec. 401. We agree with the Pan-American decision that it would be unwise for the Board to close its eyes to the fact that with completion of the certification process, there would be in existence an air-surface carrier control relationship which important segments of the Act were designed to regulate." (p. 386)

The Interstate Commerce Commission has repeatedly called attention to dangers of this character. For example, in

Raymond Bros. Motor Transportation, Inc.—Purchase, 37 M.C.C. 431, 433 (1941),

the Commission said:

"Where, as in the instant case, a transaction involving purchase of the properties of a motor carrier is subject to the requirements of section 5, no part of such transaction may be lawfully consummated without our prior approval. To find otherwise would leave carriers free, especially in cases where their operations duplicate each other, or are substantially duplicate, to secure a monopoly, without the necessity of our first considering the desirability of the transaction in the public interest, merely by the device of acquiring the intrastate rights and physical properties of a vendor motor carrier (or several vendors), the latter agreeing to abandon operations in interstate or foreign commerce." (p. 433)

See also:

Wilson Storage and Transfer Co.—Purchase, 36 M.C.C. 221, 227 (1940)

Texas, New Mexico and Oklahoma Coaches, Inc.—Purchase, 55 M.C.C. 269, 275 (1948).

Mooney—Control, 56 M.C.C. 771, 781 (1950); 60 M.C.C. 103 (1954)
Bekins—Control, 65 M.C.C. 56, 59 (1955)

[fol. 94]

III.

The Jurisdiction of the Interstate Commerce Commission Under Section 5 of the Act Is "Exclusive and Plenary," Comprehends Intrastate as Well as Interstate Operations, and Expressly Negatives the Exercise of Any Authority on the Part of the State

As heretofore noted, Section 5(11) of the Act declares that "The authority conferred by this Section shall be exclusive and plenary," and also provides that transactions authorized by the Commission under its terms may be carried into effect "without invoking any approval under State authority." Of necessity, when interstate and intrastate services and transactions are related and commingled, the Federal authority over both is complete and paramount. As said by the Supreme Court of the United States in

Houston East & West Texas Railway Co. v. *United States*, 234 U.S. 342, 351-2 (1914):

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

That Section 5(11) effectively supersedes state laws inconsistent therewith has been authoritatively determined by the Supreme Court of the United States:

Seaboard Air Line Railroad Co. v. *Daniel*, 333 U.S. 118 (1948)
Schwabacher v. *United States*, 334 U.S. 182 (1948)
Thompson v. *Texas Mexican Railway Co.*, 328 U.S. 134 (1946)

See also:

Kansas City Southern Ry. Co. v. *Daniel*, 180 F.2d 910 (C.A. 5th, 1950)

New England Greyhound Lines v. *Powers*, 108 F. Supp. 953, 957 (D. Rhode Island, 1952)

[fol. 95] In the latter recent decision, the United States District Court for the District of Rhode Island upheld the Commission's exercise of authority under Section 5 whereby transfer of an intrastate motor carrier certificate was approved, notwithstanding a conflict with the statute and constitution of Rhode Island. The District Court ruled that such power and authority were in the Interstate Commerce Commission by virtue of Section 5 of the Act in the following terms (p. 957):

> "The Court finds therefore that the Interstate Commerce Commission had the power and authority to issue its Report and Order of February 13, 1951, with reference to the plaintiff and the intervenor, although both are motor carriers, and although the laws to be superceded are state laws."

The legislative history of Section 5 of the Interstate Commerce Act demonstrates that in adopting the Transportation Act of 1940 Congress intended to have transactions such as that here proposed treated as part of a national problem to which a national and uniform policy was to be applied by the Interstate Commerce Commission, and by that Commission only, within and by means of the statutory framework enacted as Section 5 of the Interstate Commerce Act.

Baggett Transp. Co. v. *United States*, 116 F. Supp. 167, 170 (N.D. Ala., 1953)

National Transportation Policy, 54 Stat. 899 (1940), 49 U.S.C.A., note preceding Section 1

Report of Committee of Three, House Document No. 583, 75th Cong., 3rd Sess., 1938, contained in 2 H. Misc. Docs. 19, 41, 44

Report of Committee of Six, From Hearings on H.R. 2531, House Committee on Interstate and

Foreign Commerce, 76th Cong., 1st Sess., 1939, Vol. 1, pp. 259-60. See also pages 261 and 262 of this report.

Senate Report on S. 2009, Senate Report No. 433, 76th Cong., 1st Sess., May 16, 1939, contained in 2 Sen. Misc. Reps., pp. 1, 2. See also pages 2, 3, 4 and 6 of this report.

[fol. 96] *House Report on Substitute for S. 2009*, House Report No. 1217, 76th Cong., 1st Sess., July 18, 1939, contained in 6 H. Misc. Reps., pp. 3-4, 10.

Conclusion

The complaint herein fails to state a claim upon which relief can be granted and should therefore be dismissed.

Respectfully submitted,

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California; Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 97] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF MOTION OF INTERVENING DEFENDANTS MOTION TO DISMISS COMPLAINT—Filed January 23, 1956

[fol. 98] Stanley N. Barnes, James E. Kilday, John H. D. Wigger, Department of Justice, Washington 25, D. C.; Lloyd H. Burke, United States Attorney, Post Office Building, Seventh and Mission Streets, San Francisco, California, Attorneys for Defendant, The United States of America.

To:

Spurgeon Avakian, W. O. Weissich, Francis W. Collins, Financial Center Building, Oakland 12, California; Jack Robertson, Keating Building, Menlo Park, California, Attorneys for Plaintiffs.

Robert Gilnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for Defendant, Interstate Commerce Commission.

You will please take notice that on Thursday, February 23, 1956 at 10:00 o'clock A.M. or as soon thereafter as counsel may be heard in the courtroom of the Honorable Oliver J. Carter, in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, intervening defendants, Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation will bring on for hearing before the above entitled Court the aforesaid Motion to Dismiss Complaint for Failure to State a Claim Upon Which Relief Can Be Granted.

Dated at San Francisco, California, January 20, 1956.

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California; Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 99] Certificate of service by mail of Motion to Dismiss Complaint, Memorandum of Points in Support of Motion to Dismiss Complaint, Draft of Proposed Judgment of Dismissal and Notice of motion (omitted in printing).

[fol. 101] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF JOINT MOTION BY U.S. AND I.C.C. FOR JUDGMENT ON PLEADINGS—Filed February 2, 1956

To the Plaintiffs and Defendants in Intervention and their respective attorneys in this cause:

Please Take Notice that at 10 a.m. on February 23, 1956, or whenever the hearing is held on the motion of Defendants in Intervention to dismiss the complaint in this cause for failure to state a claim upon which relief can be granted, the [fol. 102] attorneys for the Defendants United States of America and Interstate Commerce Commission will jointly move the Court for judgment on the pleadings in favor of said Defendants and against the Plaintiffs herein upon the reasons and authorities hereinafter specified.

Reasons and Authorities

This joint motion for judgment on the pleadings is based on Rule 12(c) of the Federal Rules of Civil Procedure and the following:

1. The present notice, and reasons and authorities;
2. The complaint and attached exhibits showing the proceedings before the Defendant Interstate Commerce Commission from which the present cause arose;
3. The joint answer of the Defendants United States of America and Interstate Commerce Commission.

The various papers on file herein show that there is no issue of fact presented by the pleadings, but solely a question of law concerning the jurisdiction of the Defendant Interstate Commerce Commission to issue the order complained of by the Plaintiffs.

The aforesaid Defendants respectfully submit that said question of law should be resolved on the grounds stated in said papers and that a judgment on the pleadings should accordingly be granted in their behalf and against the Plaintiffs, the latter to pay the costs of the action.

An appropriate draft of judgment will be submitted to the Court and all parties of record herein prior to the hearing on this motion.

[fol. 103] Dated: February 2, 1956.

Lloyd H. Burke, United States Attorney, By: s/ William B. Spohn, Assistant United States Attorney, On behalf of the defendants, United States of America and Interstate Commerce Commission.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 104] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS—Filed February 17, 1956

To the Defendants and Defendants in Intervention Named Above and to their respective attorneys:

You and each of you will please take notice that on February 23, 1956, at 10:00 a.m., in the Courtroom of the Honorable Oliver Carter, District Judge, in the United States Post Office Building in San Francisco, or at such other time or place as the Court might designate, the plaintiffs will move the Court for judgment on the pleadings in favor of plaintiffs for the reason that the pleadings of the various [fol. 105] parties show that there is no question of fact involved in the case, and that the sole question presented is one of law which should be determined in favor of plaintiffs.

This motion will be made pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and on the papers on file

herein and will be supported by the brief heretofore filed by plaintiffs in opposition to the motions of the various defendants for dismissal and for judgment on the pleadings and on oral argument to be presented to the Court.

An appropriate draft of judgment will be submitted to the Court and all parties of record prior to the hearing on this motion.

Dated this 16th day of February, 1956.

Spurgeon Avakian, Jack Robertson, By Spurgeon Avakian, Attorneys for Plaintiffs.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 106] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

DRAFT OF JUDGMENT ON THE PLEADINGS PROPOSED BY THE DEFENDANTS UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Judgment on the Pleadings

The motion of the Defendants United States of America and Interstate Commerce Commission for judgment in their favor on the pleadings, pursuant to Rule 12(c) of the Fed-
[fol. 107] eral Rules of Civil Procedure, having come on for hearing before the Court of three judges specially constituted, pursuant to Section 2284 of Title 28, United States Code, on ....., 1956, and the motion having been heard on argument and brief and considered by the Court on the entire record, and then submitted for decision, and it appearing to the Court that said motion should be granted, and that the complaint should be dismissed with prejudice;

It Is Hereby Ordered, Adjudged, and Decreed that:

1. The motion for judgment in favor of the Defendants United States of America and Interstate Commerce

Commission on the pleadings be, and it is hereby granted;

2. The complaint be, and it is hereby dismissed with prejudice;

3. The Plaintiffs be, and each of them is hereby denied all relief against the said Defendants; and

4. The said Defendants do have and recover from the Plaintiffs their costs herein, taxed in the amount of $.....

Done in Open Court this ..... day of ....., 1956.

.....
Judge

.....
Judge

.....
Judge

[fol. 108] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 111] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

STIPULATION OF DISMISSAL AS TO AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA WITH PREJUDICE—Filed February 21, 1956

Pursuant to Rule 41, Subdivision (a) (1) (ii) of the Federal Rules of Civil Procedure, it is hereby stipulated that the above entitled action of plaintiff Amalgamated Association of Street, Electric Railway and Motor Coach [fol. 112] Employees of America, Divisions 1055, 1222, 1223, 1225, and 1471, and said plaintiff's complaint filed therein

be and the same are hereby dismissed with prejudice as against all of the defendants named in said complaint and the defendants in intervention.

Dated: February 21, 1956.

Jack Robertson, Attorneys for Plaintiffs.

John H. D. Wigger, Attorneys for defendant United States of America.

John H. D. Wigger, on behalf of the Interstate Commerce Commission, Attorney for defendant Interstate Commerce Commission.

Allan P. Matthew, Gerald H. Trautman, Douglas Brookman, Attorneys for defendants in Intervention.

[fol. 113] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTER CLUBS, CONTRA COSTA COUNTY COMMUTERS ASSOCIATION and AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, Divisions 1055, 1222, 1223, 1225 and 1471, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER OF DISMISSAL WITH PREJUDICE—February 23, 1956.

Pursuant to the dismissal and stipulation on file herein, it is hereby ordered that the above entitled action of plain-

tiff Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Divisions 1055, 1222, 1223, 1225 and 1471, and said plaintiff's complaint filed therein be and the same are hereby dismissed with prejudice as against all of the defendants named in the complaint and the defendants in intervention.

Dated: February 23, 1956.

/s/ Oliver J. Carter, United States District Judge.

[fol. 114] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

[Title omitted]

MOTION OF PLAINTIFF FOR LEAVE TO AMEND COMPLAINT—Filed February 28, 1956.

Plaintiffs County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association respectfully move the Court for leave to amend their complaint on file herein by adding subparagraph (d) to Paragraph X thereof, and by adding a new Paragraph XI, as set forth in the proposed Amendment filed and served herewith.

This motion is made pursuant to Rule 15 of the Federal Rules of Civil Procedure and is supported by the Memorandum in Support of Motion for Leave to Amend Complaint, which is filed and served herewith.

Respectfully submitted,

/s/ Spurgeon Avakian, Attorney for Plaintiffs

[fol. 115] Certificate of Service (omitted in printing).

[fol. 116] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

AMENDMENT TO COMPLAINT

Plaintiffs County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association amend their complaint on file herein by adding subparagraph (d) to Paragraph X thereof, and by adding a new Paragraph XI, as follows:

X.

* * * * * * *

(d) The transactions described in said application and authorized in said order are not consistent with the public interest, and the finding of the Interstate Commerce Commission that said transactions will be consistent with the public interest is not supported by substantial evidence, and is in fact contrary to the evidence, for the following reasons, among others:

(1) There is no finding that Golden Gate Transit Lines will be financially able to perform the [fol. 117] operations in question; and, to the extent that such a finding may be implied from the report of the Interstate Commerce Commission, there is no substantial evidence to support such implied finding;

(2) The proposed financial structure of Golden Gate Transit Lines is insufficient and inadequate, and the provision in said report and order whereby Pacific Greyhound Lines is to supply Golden Gate Transit Lines with a cash investment of only $250,000.00 is not sufficient to protect the public against discontinuance of the operations as a result of financial insolvency;

(3) There is no substantial evidence to support the finding, or implied finding, that the intrastate

operations in question constitute a burden on the interstate operations of Pacific Greyhound Lines; and, on the contrary, the evidence affirmatively shows that any losses on the operations in question have been fully offset by the revenue received by Pacific Greyhound Lines from its other intrastate operations in California, and that the total intrastate operations of Pacific Greyhound Lines in California have been conducted at rates which have returned it a reasonable profit;

(4) There is no substantial evidence to support the implied finding that the California Public Utilities Commission has determined the fares of Pacific Greyhound Lines for the operations in question "in the light of Pacific's systemwide operations and revenues"; and, on the contrary, [fol. 118] the evidence affirmatively shows that, to the extent the California Public Utilities Commission has considered operations and revenues of Pacific Greyhound Lines other than those involved in the local operations in question, it has limited such consideration to the intrastate operations performed by Pacific Greyhound Lines in California;

(5) There is no substantial evidence to support the finding that the negotiation of employment contracts with the union has in the past been made difficult because the terms applicable to local drivers have been embraced in a single contract applicable to intercity drivers as well, and that such difficulty would be alleviated by the transfer of the local operations in question and the consequent separation of labor negotiations for the two classes of employees; and, on the contrary, notwithstanding said finding, Pacific Greyhound Lines and Golden Gate Transit Lines, on or about February 21, 1956, entered into agreements with the union which provide that, if the proposed transaction is consum-

mated, employees of Pacific Greyhound Lines and Golden Gate Transit Lines will be covered by the same employment contracts, and employees of Pacific Greyhound Lines who transfer to Golden Gate Transit Lines will have the privilege to transfer back to Pacific Greyhound Lines without loss of seniority;

(6) There is no substantial evidence to support the implied finding that the alleged managerial ef- [fol. 119] ficiencies which would result from the proposed transactions could not be achieved as well by creating a separate operating division as by creating a separate subsidiary corporation;

(7) There is no substantial evidence to support the finding that there has been a decline in Pacific Greyhound Lines' long-haul traffic; and, on the contrary, there has been an increase in said traffic;

(8) There is no substantial evidence to show that, when all the factors affecting the public interest are weighed and balanced, the proposed transaction will protect, promote, or safeguard the public interest, or will provide for the best and most economical use of the transportation facilities involved.

XI.

The Interstate Commerce Commission abused its discretion in denying plaintiffs' Petition for Rehearing and Reconsideration, a copy of which is attached hereto as Exhibit E, for the following reasons, among others:

(a) Said Petition shows that, subsequent to the issuance of the Interstate Commerce Commission order in question, the chief witness appearing for applicants before the Interstate Commerce Commission (Defendants in Intervention here) gave testimony before the California Public Utilities Commission substantially contradictory to his testimony before the In-

terstate Commerce Commission on a material issue, namely, the working capital requirements for the operations in question, in that said witness testified [fol. 120] before the Interstate Commerce Commission that $150,000.00 would be sufficient working capital, whereas he testified before the California Public Utilities Commission that the required working capital was equal to the cash operating expenses for one month (which, applied to this case, exceeds $320,000.00);

(b) Said Petition shows that the $250,000.00 cash investment required by the Interstate Commerce Commission as a condition of its order is insufficient to provide the necessary working capital for the operations in question.

Respectfully submitted,

/s/ Spurgeon Avakian, Financial Center Building, Oakland 12, California, Attorney for Plaintiffs.

W. O. Weissich, District Attorney, County of Marin.
Francis W. Collins, District Attorney, County of Contra Costa, Of Counsel.

[fol. 122] EXHIBIT "E"—TO AMENDMENT TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

* * * * *

Docket No. MC-F-5643

In the Matter of

THE GREYHOUND CORPORATION—CONTROL; PACIFIC GREYHOUND LINES—CONTROL; GOLDEN GATE TRANSIT LINES—PURCHASE (PORTION)—PACIFIC GREYHOUND LINES

Docket No. MC-1511

(Sub No. 103)

Application of Pacific Greyhound Lines, a corporation, San Francisco, California, Common Carrier, Regular Routes, for continuance of operations over portions of routes involved in the sale.

PETITION FOR REHEARING AND RECONSIDERATION

OF

COUNTY OF MARIN

COUNTY OF CONTRA COSTA

MARIN COUNTY FEDERATION OF COMMUTER CLUBS

CONTRA COSTA COUNTY COMMUTERS ASSOCIATION

Protestants

The protestants named above hereby petition the Commission to grant a rehearing in this matter, and to reconsider its decision and order served on July 15, 1955 (dated July 6, 1955), upon the following grounds and for the following reasons:

1. *Rehearing.* Protestants request an opportunity to present additional evidence not previously available to them, showing that on July 28, 1955, before the California Public Utilities Commission, applicant Pacific Greyhound Lines (hereinafter called Greyhound) took the position that its working capital requirements for performing the services involved in this proceeding are substantially in excess both [fol. 123] of the sum of $150,000.00 which Greyhound con-

tended in this proceeding would be adequate and of the sum of $250,000.00 which this Commission found in said decision and order would be adequate. The evidence sought to be presented consists in substance of the testimony of Mr. M. C. Frailey, Vice-President of Greyhound, before the California Public Utilities Commission on July 28, 1955, in Application No. 34362, a verbatim transcript of which is attached to this petition as Exhibit A. Said testimony shows that, as applied to this proceeding, the working capital requirements would be in excess of $320,000.00.

Protestants had no opportunity to present such evidence before because Mr. Frailey's testimony was not given until July 28, 1955.

2. *Reconsideration.* Protestants also request this Commission to reconsider the findings and conclusion set forth in the following exceptions:

(a) Protestants take exception to the finding on Sheets 28 and 29 of the mimeographed decision that the proposed transfer will be consistent with the public interest if the cash payment by Greyhound to Golden Gate Transit Lines (hereinafter called Golden Gate) is $250,000.00.

(b) Protestants take exception to the finding on Sheet 26 of the mimeographed decision that a cash investment in Golden Gate by Greyhound of $250,000.00 would be adequate for Golden Gate's working capital requirements.

[fol. 124] (c) Protestants take exception to the conclusion on Sheet 28 of the mimeographed decision that the proposed transaction is within the scope of Section 5 of the Interstate Commerce Act.

In support of this petition, protestants respectfully show as follows:

1. *Greyhound's Change of Position on Working Capital Requirements.*

Contrary to its representation to the Interstate Commerce Commission in this proceeding that the $150,000.00 in cash to be transferred by Greyhound to Golden Gate

would provide it with adequate working capital to carry on the transferred operations, Greyhound took the position before the California Public Utilities Commission on July 28, 1953, that the working capital required to perform these same services is equal to one month's cash expenses (which would amount to $321,183.00 in this case) and that such amount should be included in the rate base for purposes of determining fair and reasonable rates.

This contention to the California Commission does more than conflict sharply with Greyhound's position in this case. It also undermines this Commission's conclusion that $250,000.00 would provide adequate working capital.

Greyhound's contention before the California Public Utilities Commission was taken in the course of public hearings on Greyhound's Application No. 34362 for increase in Greyhound's fares between San Francisco and Marin [fol. 125] County, which is one of the services involved in this proceeding. Greyhound's Vice-President, Mr. M. C. Frailey, who was also the principal witness of applicants in this proceeding, presented an exhibit setting forth the rate base on which its rate of return should be calculated. This exhibit showed working capital requirements for 1955 of $132,700.00 for the Marin County services and $158,000.00 for the Peninsula services. (The latter include some operations not covered by this application, but that is more than offset by the Contra Costa County operations which were not included in said exhibit but which are involved in this proceeding.)

Mr. Frailey's testimony on this point is set forth *verbatim* in the attached Exhibit A. It shows unequivocally that the working capital needs are equal to one month's costs of operation (exclusive of depreciation and other non-cash items), and that this represents the average investment in prepayments, such as required insurance premiums and other deposits and tax prepayments.

Exhibit 16 in this case shows average monthly cash expenses for the operation in question of $321,183.00.*

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* Total 1953 expenses of $4,013,600.00, less depreciation of $159,400.00, equals cash expenses of $3,854,200.00. That divided by 12 equals $321,183.00. This is probably less than actual 1955 costs, since there have been increases in wages and other costs during the intervening period.

In this proceeding, Mr. Frailey testified categorically that the provision for $150.000.00 in working capital was "very definitely" adequate (Tr. 93), and that *even without a fare increase* Golden Gate could carry on these operations for a year or two without becoming bankrupt (Tr. 140). [fol. 126] Moreover, Mr. Frailey testified that it would be advisable for Golden Gate to purchase 190 new fare boxes, at a cost of $500.00 each (Tr. 152), which would require an additional capital outlay of $95,000.00.

In its rate increase applications presently pending before the California Public Utilities Commission for its Peninsula and Marin County services** Greyhound has submitted exhibits in which it contends that, under its present fare structure (which includes an increase granted by the California Commission in November, 1954, it will lose $311,500.00 in the Marin and $66,100.00 in the Peninsula services during the year ending June 30, 1956.

How, then, is Golden Gate going to continue in business even for one year, if it starts out with only $250,000.00? Even assuming that the rates are set at a fully compensatory basis, it would still be necessary to have an initial cash investment of at least $500,000.00, consisting of the following, if the operation is to start on a sound financial basis:

Working capital	$321,000.00
Annual excess of equipment obligations over depreciation	39,000.00
Estimate of first year outlay for cash fare boxes	40,000.00
Unusual expenses incident to operation by a new company	100,000.00
	$500,000.00

[fol. 127] But before the California Public Utilities Commission on July 28, 1955, Mr. Frailey testified that one month's cash expenditures, or over $320,000.00 as applied

** No application for fare increase has been filed with respect to the Contra Costa service, which the Public Utilities Commission found in 1951 was being operated at an annual loss of $10,800.00. *In re Pacific Greyhound Lines, et al.* (1951) 50 Cal. P.U.C. 650, 682 (in evidence as Ex. 21 in this case).

to this case, is necessary as working capital to cover normal prepayments, and that "the minute you don't have working capital you are not very sound" (Ex. A, p. 2).

This Commission should permit this evidence to be shown in this case, and should require Greyhound to submit a satisfactory explanation, if any there can be, for this striking inconsistency before permitting Greyhound to transfer its operations to Golden Gate.

2. *The Adequacy of $250,000.00 Working Capital.*

Even apart from Greyhound's own assertion, before the California Public Utilities Commission, that its working capital requirements would exceed $320,000.00, we urge this Commission to re-examine its conclusion that $250,000.00 in cash would provide sufficient working capital.

The $250,000.00 would be insufficient even to meet the normal average prepayments, to say nothing of "the general ability to have cash and funds available to meet your obligations and pay your bills, and generally be in a sound financial shape to operate your business" (see Mr. Frailey's testimony, Ex. A, p. 2).

In addition, Golden Gate will have annual instalment obligations on busses of $163,761.00 for several years into the future (Ex. 12). Since the annual depreciation on these busses will be only $124,700.00 (Ex. 16), the cash outlay from capital funds will be $39,000.00 per year.

[fol. 128] 3. *The Applicability of Section 5.* We do not intend to reargue herein at length the legal question of whether Section 5 of the Interstate Commerce Act applies to this kind of a transaction. We refer the Commission instead to the argument set forth in our initial Brief in this matter, at pages 3-7, and do not go beyond a reiteration of our contention that the statute is limited to transfers between existing carriers and does not apply to a transfer to a would-be carrier, such as Golden Gate.

WHEREFORE, protestants request the Commission to reopen this matter for the presentation of additional testimony, to reconsider its decision, and after such further hearing and reconsideration to deny the application.

Respectfully submitted,

/s/ Spurgeon Avakian
SPURGEON AVAKIAN
Attorney for County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs, Contra Costa County Commuters Association,
Protestants.

W. O. WEISSICH
District Attorney
County of Marin

FRANCIS W. COLLINS
District Attorney
County of Contra Costa
Of Counsel.

[fol. 129] CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Petition for Rehearing and Reconsideration to be served on each of the parties hereto, by deposit thereof on August 9, 1955, in the United States mail at Oakland, California, with first class postage fully prepaid, addressed to counsel for each of said parties as follows:

ALLAN P. MATTHEW and GERALD TRAUTMAN
1400 Balfour Building
San Francisco, California
(Attorneys for Applicants)

JACK ROBERTSON
Keating Building
Menlo Park, California
(Attorney for Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Divisions 1055, 1222, 1223, 1225, and 1471, Protestant)

Dated: August 9, 1955.

/s/ Spurgeon Avakian
SPURGEON AVAKIAN

[fol. 130] EXHIBIT "A" TO EXHIBIT "E"

TESTIMONY OF M. C. FRAILEY, VICE-PRESIDENT OF PACIFIC GREYHOUND LINES, BEFORE THE CALIFORNIA PUBLIC UTILITIES COMMISSION ON JULY 28, 1955, IN APPLICATION NO. 34362 (questions by Mr. Avakian):

Q. Would you turn to page 6 of Exhibit R-4.

This deals with a computation of rate base, as you will notice.

A. Yes, sir.

Q. Do you have the page before you?

A. Yes, sir.

Q. In your opinion is it proper to include working capital in your rate base?

A. Surely is.

Q. Why is that?

A. Because I think you have to have working capital to run any business.

Q. Well, how——

A. And run a business on a sound basis.

Q. Well, how about this figure of $129,400 as working capital for 1954 and $132,700 as working capital for 1955 in the Marin County services.

In your judgment is that a proper figure to include?

A. Yes.

Q. In other words, you think you actually need that amount of working capital to run this Marin service?

A. Well, we had to have working capital to start it, and frankly we have to have working capital to pay the losses. If we didn't have something we would be out of business shortly.

Q. Well, you prepared this page of your exhibit as the [fol. 131] rate base, and for purposes of rate base have you limited yourself to the working capital that you need to carry on your business?

A. In my opinion it is a reasonable charge to include for working capital.

Q. What type of needs are there for this working capital?

A. Well, the general ability to have cash and funds available to meet your obligations and pay your bills, and

generally be in a sound financial shape to operate your business, and the minute you don't have working capital you are not very sound.

Q. Now, you have designated this as "Average investment in required insurance premiums and other deposits, tax prepayments, etc."

Are there any substantial items that are covered by the "etc."?

A. No.

This represents, what you might say is prepayments normally classified in a balance sheet.

Q. Are your working capital requirements for Marin determined on the basis of allocation of Division 5 working capital, or are they computed in some other way?

A. No, they are computed on the basis of Marin County expenses, excluding depreciation and such items of non-cash items.

Q. I note——

[fol. 132] A. It represents one month's operating expenses.

Q. I note from Exhibit R-9 that there is a figure of $158,000 shown as working capital for the Peninsula for 1955.

Does that figure, plus the Marin County in Exhibit R-4 represent your total Division 5 requirements?

A. Yes, it would be on whichever basis it was worked out.

It was the costs, as I have explained them, one month's costs, less your depreciation and non-cash items, based on the figures of each area.

Q. You feel quite confident that these are proper amounts to be set up as working capital requirements?

A. Yes, I feel that definitely they are. The company should have working capital. This company would have to provide working capital; a new company will have to provide working capital to go in, and I am sure that if you were talking about a new company you would want to provide working capital to be sound and substantial, and I think we are entitled to it.

Mr. Trautman: So that the record will be right, the Peninsula figure you gave, Mr. Avakian, included other operations than Divisions 5, as I guess you know.

Mr. Avakian: No, I didn't.

Are they substantial in character?

The Witness: They include the Division 4 operations [fol. 133] between San Francisco and San Jose, and also out to Half Moon Bay and that area.

Q. In terms of——

A. But the same principle was used.

Q. In terms of the proportions, does the San Francisco and San Jose volume of business loom large or small in the total operations from which that $158,000 figure comes?

A. It is sizeable.

Q. About what proportion of it?

A. I don't know off hand, but it is sizeable.

But irrespective, the same principle was used in both Marin County and in the so-called Peninsula, plus this other, in setting up working capital.

[fol. 134] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF PLAINTIFF IN SUPPORT OF MOTION FOR LEAVE TO AMEND COMPLAINT—Filed February 28, 1956

Rule 15 of the Federal Rules of Civil Procedure sets forth a liberal policy of permitting amendments to pleadings, to the end that a controversy may be fully tried on all issues. Subsection (a) reads in part as follows:

"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the

adverse party; and leave shall be freely given when justice so requires. . . ."

Subsection (b) permits amendments to conform to the evidence, even after judgment.

Subsection (d) even authorizes supplemental pleadings to set forth transactions occurring since the date of the prior pleadings.

[fol. 135] The application of Rule 15 by both trial and appellate courts shows a uniform spirit of liberality in granting leave to amend. Even though the granting of such leave after a responsive pleading has been filed* is a matter of judicial discretion, there have been numerous reversals on appeal where strong affirmative reasons for denying leave to amend are not shown.

The case of *Lloyd* v. *United Liquors Corp.* (CA 6, 1953) 203 F.2d 789, is typical. Plaintiff's counsel had stated, on argument of motions for dismissal and summary judgment in an anti-trust treble-damage action, that he wanted to reserve the right to amend. Thereafter, the court granted the defense motions, and refused plaintiff permission to amend the complaint. In reversing the order denying leave to amend, the appellate court emphasized the liberal policy of permitting amendments. Answering the argument that amendment of the complaint would have delayed final disposition of the case by the trial court, the appellate court quoted with approval (203 F.2d at 793) the following language from *Doehler Metal Furniture Co.* v. *United States* (CA 2, 1945) 149 F.2d 130, 135:

"But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay."

See, also:

Maryland Casualty Co. v. *Rickenbaker* (CA 4, 1944) 146 F.2d 751;

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* It may be noted, parenthetically, that Defendants in Intervention have not yet filed a responsive pleading in this case, although the United States and the Interstate Commerce Commission have done so.

Atlantic Coast Line R. Co. v. *Mims* (CA 5, 1952) 199 F.2d 582;
Rogers v. *Girard Trust Co.* (CA 6, 1947) 159 F.2d 239.

In a three-judge court case involving review of an Interstate Commerce Commission order, the plaintiff was permitted to amend his complaint on the day of the trial to set [fol. 136] forth a completely new ground. See *L. A. Tucker Truck Lines, Inc.* v. *United States* (E.D. Mo. 1951) 100 F. Supp. 432, 434, where the court said:

> "Amendments to pleadings are largely discretionary with the courts and the courts have repeatedly held that amendments to pleadings should be allowed with great liberality at any stage of the proceedings unless violative of settled law or prejudicial to rights of opposing parties. The courts have been very liberal in permitting amendments where it is necessary to bring about a furtherance of justice."

The timeliness of the application is significant only on the question of whether the opposing parties will be substantially prejudiced. Delay of itself is not ground for reversal, nor is there any requirement of diligence or excusable neglect (as there would be in a motion to set aside a judgment).

Armstrong Cork Co. v. *Patterson-Sargent Co.* (D.C. Ohio, 1950) 10 F.R.D. 534;
Markert v. *Swift & Co., Inc.* (CA 2, 1949) 173 F.2d 517;
Maryland Casualty Co. v. *Rickenbaker* (CA 4, 1944) 146 F.2d 751.

In the *Maryland Casualty Co.* case, the trial court had denied leave to amend the complaint during the trial, for the reason that, with proper preparation of the case, plaintiff could have proposed the amendment before the trial. In rejecting this as a ground for denial, and holding that the amendment should have been allowed, the appellate court said (146 F.2d at 753):

> "The more important question for the court's consideration, at the time that the motion to amend was made, was the effect which it would have, if granted, upon the rights of the parties and the proper disposition of the business of the court."

Similarly, in *McDowall* v. *Orr Felt & Blanket Co.* (CA 6, 1944) 146 F.2d 136, where the trial court had refused leave to amend on the ground that the issues had been settled at a previously-held pre-trial conference, the appellate court reversed with the following observation (146 F.2d at 137):

> [fol. 137] "The only question which confronts us is whether appellant should have been permitted to file his amended complaint, and it is here unnecessary to discuss any legal or factual questions with regard to the content of the proposed amended pleading. Rule 15 of the Federal Rules of Civil Procedure provides that, in the circumstances disclosed in this case, a party may amend his pleading only by leave of court . . . 'and leave shall be freely given when justice so requires.' Subsection (a). The rule continues, confirms, and emphasizes the practice in effect prior to its adoption, in which liberality in amendment was encouraged and favored, where no prejudice or disadvantage was suffered by the opposing side."

We can perceive no substantial prejudice to any of the defendants from permitting plaintiff to raise its additional grounds of attack on the Interstate Commerce Commission order at this time, as distinguished from having raised them at the original trial. The case is not yet fully at issue, since Defendants in Intervention have not filed their answer. The fact that the authority granted by the Interstate Commerce Commission must be exercised within 180 days from the effective date of the order (which is presently October 19, 1955) does not present any real problem, since this court can (and on request presumably would) stay the effective date until final disposition of the case. It may be noted that, although this action was filed on October 18, 1955, Defendants in Intervention did not make their motion

to intervene until January 9, 1956, and, as pointed out above, have not yet filed their answer.

The only inconvenience to the defendants, in reality, is that of answering new grounds after the sufficiency of the original complaint has been challenged on legal grounds. As the cases cited herein show, that is not a valid ground for refusing leave to amend; on the contrary, the preferred policy is to allow leave to amend if the original complaint is subject to dismissal on legal grounds.

[fol. 138] Nor is there any hardship on the court different from that normally present in such situations. The legal question as to the scope of Section 5 of the Interstate Commerce Act is one which will remain in the case even if the proposed amendment is allowed, and the time devoted to argument of that question will not, therefore, have been wasted; rather, if the amendment is allowed, there will probably be no need to reargue the Section 5 issue, and the case can be submitted for final decision after trial of the additional issues raised by the amendment.

The proposed amendment to the complaint raises substantial questions going to the merits and validity of the order under review. The case is one of considerable public importance and should not be disposed of without consideration of these matters. In order that the court might be more fully aware of the nature of these questions, we have set forth the grounds with considerably more specificity than would be necessary as a matter of law.

This amendment should be permitted, in accordance with the principles enunciated in the cases cited above and embodied in Rule 15.

Respectfully submitted,

/s/ Spurgeon Avakian, Attorney for Plaintiffs.

[fol. 139] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT—Filed March 8, 1956

The United States and the Interstate Commerce Commission strongly oppose the motion on the ground that the Congressional purpose that suits attacking orders of the Commission should be speedily determined would be frustrated if parties are permitted to amend their complaints in circumstances such as these, where the case is ready to be [fol. 140] finally disposed of,[1] briefs have been exchanged, and the Court has heard the case.

Furthermore, in this case, it is manifestly clear that there are no equities which would require the sacrifice of this Congressional purpose. On the contrary, in their "Memorandum in Support of Motion For Leave to Amend Complaint" the plaintiffs do not even attempt to excuse their last minute effort to change the whole nature of their complaint, which if successful would result in delaying the judicial determination of the validity of the Commission's action and the carrying out of the Commission's order.

If the plaintiffs should succeed in their efforts, a ready technique is available for those who seek to hamstring the Commission's action by making what is in effect a *seriatim* attack on its order. Parties could, and undoubtedly would, initially attack an order of the Commission on one ground, then wait until the Court has assembled to amend their complaint and attack the order on another ground. By following such tactics, they would obtain the very goal they seek,

[1] In their brief in opposition to motion of defendants for judgment on the pleadings, and motion of defendants in intervention to dismiss, the plaintiffs stated that the sole question in the case was whether the Commission had jurisdiction over the transaction. (Page 3)

namely, delay; which would be inevitable if such a procedure were followed, because additional time would be required by the defendants to prepare to meet the new issues raised and because of the fact that the Court could reassemble only at such a time as would be convenient for all of the members [fol. 141] thereof. This sort of procedure would be an inexcusable imposition on the Court, and a device for impeding the Congressional desire for a speedy determination of suits to set aside orders of the Commission.

The plaintiffs filed their complaint on October 18, 1955. There never was and never could be any dispute as to the fact that there was only one issue raised by the complaint, namely, the Commission's jurisdiction. In spite of this fact, the plaintiffs waited until the Court had assembled on the morning of the hearing to finally dispose of the case to indicate for the first time their desire to amend the complaint, stating that they wanted to be permitted to amend in the future if the Court should decide against them on their original complaint. At this time they stated that they wanted to amend simply in order to attack the sufficiency of the Commission's findings in light of the fact that the Union and Pacific Greyhound Lines had just entered into an agreement whereby the employees of Golden Gate Transit Lines would for a period of time be made parties to the agreement which Pacific Greyhound Lines had with the union. However, in their proposed amendment which they filed on February 27, 1956, the plaintiffs attempt to broaden their action so as to allege not only that the findings of the Commission fail to support the order, but also that the evidence fails to support the findings and that the Commission abused its discretion in denying their petition for reconsideration. In other words, under their proposed amendment the plaintiffs would enlarge their cause of action from a limited attack based on the Commission's lack of juris- [fol. 142] diction to an all-out assault upon the Commission's action. If permitted this amendment would require the Court to examine not only the findings of the Commission, but the entire record before the Commission in order to ascertain whether the findings are supported by evidence in the record as a whole.

In the memorandum in support of their motion for leave to amend, the plaintiffs apparently take the position that delay in submitting a motion to amend is of no significance at all under Rule 15 of the Federal Rules of Civil Procedure unless the opposing parties would be substantially prejudiced and that no such prejudice will result if their motion is granted. It is submitted that if the motion is granted there will be great prejudice to the defendants and that the plaintiffs misconstrue the effect of Rule 15. While this rule is to be construed liberally and while it vests broad discretion in the court in permitting an amendment to a pleading, it has been recognized that a motion to amend is not to be granted as a matter of course, but should only be freely given "when justice so requires." See for example *Schick* v. *Finch*, 8 F.R.D. 639, 640 (S.D. N.Y., 1944); *Friedman* v. *Trans America Corp.*, 5 F.R.D. 115, 116 (D. Del, 1946). In the *Finch* case, the Court in denying the defendant's motion for leave to serve an amended answer sums up the law on this point as follows (p. 640):

> "Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave [fol. 143] should not be granted. The instant case, I believe, falls into such a category. It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose."

Thus, it may be said generally that a motion to amend a complaint should not be granted as a matter of course, but must be determined in light of all the circumstances. It is submitted that the circumstances in this case do not support the plaintiffs' motion. They do not and cannot claim that they did not have full knowledge of the facts involved in the case at the time the complaint was filed on October 18, 1955,

or that their delay in seeking to amend was due to some oversight, inadvertence or excusable neglect. This is not a situation where amendment is sought for the purpose of having the pleadings conform to the evidence. This is not even the situation where parties change counsel in the course of litigation and new counsel seeks to amend on the ground that original counsel overlooked some fact or theory of law. Furthermore, this is not an instance where counsel for the plaintiffs was unfamiliar with the nature of the proceedings before the administrative body at the time the complaint was filed and seeks to amend in order to correct an oversight. Counsel for the plaintiffs have been in this case not simply since the filing of the complaint in October of 1955; they also represented the plaintiffs during the proceedings before the Interstate Commerce Commission, and, therefore, were thoroughly familiar with the whole matter. [fol. 144] It is axiomatic that events which take place after a Commission proceeding has terminated may not be considered by the Court on review of the Commission's order, and that such review is limited strictly to the record of the proceeding had before the Commission.

In *Lang Transportation Corp.* v. *United States, et al.*, 75 F.Supp. 915 (S.D. Cal., 1948), the statutory three-judge District Court said (p. 922, note 5):

> "Suits under the Urgent Deficiencies Act to set aside orders of the Interstate Commerce Commission are proceedings for judicial review upon the record before the Commission and are not trials de novo; hence evidence aliunde or dehors the record is inadmissible in the Federal Court. United States v. L. & N. R. Co., 1914, 235 U.S. 314; Tagg Brothers & Moorehead v. United States, 1930, 280 U.S. 420, 443-5; Acker v. United States, 1936, 298 U.S. 426, 434; National Broadcasting Company v. United States, 1943, 319 U.S. 190."

The Supreme Court, in *Tagg Bros.* v. *United States*, 280 U.S. 420 (1930), said (pp. 443-5):

> "* * * The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the pro-

ceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. Louisville & Nashville R.R. Co. v. United States, 245 U.S. 463, 466—compare Liscio v. Campbell, 34 F.(2d) 646, 647; and see Prendergrast v. New York Telephone Co., 262 U.S. 43, 50 and Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 289. On all issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body."

[fol. 145] A statutory three-judge District Court, in *Sakis* v. *United States*, 103 F.Supp. 292 (D.C. for D.C., 1952); refused to admit and consider certain evidence which was not before the Commission in the proceeding under review. The court said (p. 313):

"The Court ruled that the present case requires the Court to review the ruling of the Commission in the light of the evidence which was before the Commission. The Court does not believe that this proceeding is de novo in character and construes the Court's function and responsibility to be exclusively that of reviewing the case upon the basis of the record actually before the Commission at the time the Commission made the ruling."

Likewise, a statutory three-judge court for the Western District of Missouri, in its recent decision (October 3, 1955) in *Southern Kansas Greyhound Lines, Inc. et al.* v. *United States*, et al., 134 F.Supp. 502, said (pp. 510-511):

"In this connection, plaintiffs also complain that on April 1, 1954 and prior to the joint board's recommended report and order herein, a contract was made between Trails and Union Transportation Company under which one McRae, managing partner of Union Transportation Company, took over management and

control of Trails, and that the Commission knew this from its records in Control Proceeding No. MC-F-5754, before Division 5 of the Commission rendered its report and order herein, and that this presented an additional question of fitness and ability of Union Transportation Company and of McRae upon which the Commission was required to, but did not, make a finding. * * * That matter is not properly before us on this review, as this proceeding is in no sense de novo and we are confined to the record as made before the Commission. *United States* v. *L&N R. Co.*, 235 U.S. 314; *Tagg Bros. & Moorehead* v. *United States*, 280 U.S. 420, 443-5; *Acker* v. *United States*, 298 U.S. 426, 434; *National Broadcasting Company* v. *United States*, 319 U.S. 190, and plaintiff's offer in evidence, upon the hearing before [fol. 146] us, of a transcript of that control proceeding is rejected and excluded."

Moreover, it appears from an examination of the petition for reconsideration filed by the plaintiff with the Commission on August 11, 1955, that no attack was made therein on the adequacy of the Commission's findings or the sufficiency of the evidence to support said findings. Apparently the only references to findings are those which take exception to (a) the finding that the proposed transfer will be consistent with the public interest; (b) to the finding that a cash investment of $250,000 by Greyhound in Golden Gate would be adequate, and (c) to the finding that the proposed transaction is within the scope of section 5 of the Act. Clear judicial expression supports the doctrine that the failure of the plaintiff to press objections so as to permit consideration by the Commission bars review thereof when raised for the first time in court action. *United States* v. *Hancock Truck Lines, Inc.*, 324 U.S. 774, 778-79; *General Transportation Co., et al.* v. *United States, et al.*, 65 F.Supp. 981, 984, affirmed per curiam, 329 U.S. 668.

[fol. 147] In the memorandum in support of their motion for leave to amend, the plaintiffs rely heavily on *L. A. Tucker Truck Lines* v. *United States*, 100 F.Supp. 432 (E.D. Mo., Oct. 18, 1951), rev. 344 U.S. 33 (1952). There the District Court granted the plaintiff's motion made on the

day of trial for leave to file an amended petition in order to allege that the Commission's order was void since the examiner that had heard the case did not meet the qualifications of the Administrative Procedure Act. The Supreme Court had just recently held in *Riss & Co. Inc.* v. *United States,* 341 U.S. 907 (April 16, 1951), that the examiners for the Interstate Commerce Commission were subject to the provisions of the Administrative Procedure Act. In reversing the judgment on the ground that the plaintiff had waived its right to an examiner appointed pursuant to the provisions of the Administrative Procedure Act, the Supreme Court in the *Tucker* case noted that its decision in the *Riss* case had apparently prompted the plaintiff to raise the point about the examiner's qualifications. (Footnote 4, page 36).

Thus, the circumstances in the *Tucker* case for allowing the plaintiff to amend are not present here. The amendment there permitted the plaintiff to take advantage of a recent decision of the Supreme Court. The amendment raised simply a question of law, which was of vital importance since there was considerable support in the cases for the proposition that if the examiner was subject to the Administrative Procedure Act, and a hearing was conducted before a non-qualified examiner, the Commission would lose jurisdiction and any action it took would be void *ab initio.* The amendment in that case did not open [fol. 148] up for the first time the question as to whether the Commission's findings were supported by the evidence. None of the circumstances in the *Tucker* case are present here.

If the plaintiffs are permitted to amend their complaint delay is inevitable in spite of the Congressional policy that this type of case be speedily determined. In *United States* v. *Griffin,* 303 U.S. 226 (1937), the Supreme Court, speaking through Mr. Justice Brandeis, noted that Congress had established a special method for judicial review of orders of the Interstate Commerce Commission as a means in part to expedite such litigation. Thus, the Supreme Court observed that "upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others" and that, in providing for this special type of judi-

cial review, Congress sought "to avert the delays ordinarily incident to litigation." (232-233).

It is respectfully submitted that the petition of the plaintiffs should be denied in view of the Congressional policy to avert delays in this type of case and because of plaintiffs' failure to justify their delay in seeking to amend the complaint.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Motion for Leave to Amend Complaint should be denied.

Respectfully submitted,

Stanley N. Barnes, Assistant Attorney General.
Lloyd H. Burke, United States Attorney.

/s/ James E. Kilday, /s/ John H. D. Wigger, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for the United States.

/s/ Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for the Interstate Commerce Commission.

[fol. 149] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 150] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

MEMORANDUM OF DEFENDANTS IN INTERVENTION IN OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT—Filed March 10, 1956

[fol. 151] Introductory

In the view of defendants in intervention the plaintiffs' motion for leave to amend the complaint herein is wholly

without merit and is properly to be characterized as fantastic. This motion is nothing other than an imposition upon the Court and should be summarily denied.

Plaintiffs ask leave to add subparagraph (d) to paragraph X of the complaint and to add a new paragraph XI thereto. The effect of this proposed amendment is to challenge the ultimate finding by the Interstate Commerce Commission that the transaction described in the Commission's report dated July 6, 1955, is consistent with the public interest and to contend that the Commission abused its discretion in denying plaintiffs' petition for rehearing and reconsideration. The original complaint contained no challenge of this ultimate finding nor did it allege such an abuse of discretion. The complaint raised a single issue of law, whether said transaction was within the scope of Section 5 of the Interstate Commerce Act. This question has been briefed, argued and submitted to the Court for decision. The only issue raised by the complaint has been fully tried and now plaintiffs seek to raise other grounds for challenging the Commission's order herein.

The motion has only one objective—an unwarranted delay in the disposition of the action so that plaintiffs may continue to be subsidized by the other patrons of Greyhound. Counsel for plaintiffs knew at the time he filed the complaint (see affidavit attached hereto as Appendix A), and he knows now, that the Commission's findings are supported by ample evidence. Beyond question, all of the new allegations could readily have been made in the complaint [fol. 152] as initially filed—and would have been made if they had any merit.

Justice Requires That Leave to Amend Be Denied

A. *Leave to amend should not be granted after trial.*

We wish to make one point clear at the outset. This Court was not hearing merely preliminary motions on February 23, 1956. It was trying the only issue raised by the complaint, namely, the issue of jurisdiction. In short, plaintiffs have had their trial upon the pending complaint. It was expected by counsel for plaintiffs that the Court would "make a final disposition of the matter one way or the other

after hearing on the 23rd." * (Plaintiffs' letter of February 16, 1956, to Clerk of Court)

At the time of the trial plaintiffs asked for a conditional privilege to amend the complaint. They wanted permission to amend the complaint if plaintiffs should lose on the jurisdictional issue. In this connection counsel for plaintiffs said:

> "But as a result of this, may it please the Court, it is my intention during the course of the morning, and perhaps it is better to mention it now, to beg leave of the Court in the event the determination of the Court should be against us on the legal question raised, to give us permission to amend the complaint to set forth as an additional ground the challenge of the finding of the Commission that the order in question is consistent with the public interest." (Tr. 5)

[fol. 153] Later he said:

> "For that reason, we would like permission at this time, although we had not intended to raise this question before,—we would like permission at this time in the event this Court should determine against us on the legal question of jurisdiction to amend the complaint to challenge the public interest finding also." (Tr. 8)

Still later he added:

> "But the motion that I make is that in the event the determination of the Court on the motions pending here today should be adverse to the plaintiffs, the plaintiffs be given leave, pursuant to Rule 15 (a) of the Federal Rules of Civil Procedure . . ." (Tr. 14)

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* Now counsel for plaintiffs contends that the case is not even at issue. (p. 4) The answer of the defendants United States of America and Interstate Commerce Commission was filed on December 15, 1955, the motion to intervene was filed on December 29, 1955, and the motion of the defendants in intervention to dismiss the complaint was filed on January 23, 1956. These defendants are not required to file any additional pleadings in response to the pending complaint and do not intend to do so. The case is at issue on the pending complaint.

This would indeed be a novel and intriguing way to try a lawsuit: file a complaint; have a trial of the issue raised by the complaint; if an adverse determination is in prospect, amend to set forth an additional issue; have a trial on the issue raised by the amendment; if this appears to be unsuccessful, amend again; and so on. We have no doubt that the resourceful counsel for the plaintiffs would be able to find some way to keep such "installment plan" litigation going indefinitely.

At the trial the Court informed counsel for plaintiffs that such conditional permission could not be granted (Tr. 14), and the Court was plainly correct. We have been unable to find any authority which would sanction the procedure suggested by counsel for plaintiffs.

The initial excuse for the proposal to amend the complaint was that the defendants in intervention had entered into an agreement which, according to the contention of counsel for plaintiffs, in some way affects the validity of certain findings of the Commission. While it is clear from the authorities that this agreement can not [fol. 154] properly be considered by this Court, it is incumbent upon us, in view of counsel's representations, to set the record straight. The agreement with the Union was entered into pursuant to the direction of the commission that the parties would be expected to negotiate such an agreement for the protection of the employees. The agreement is for a three-year term and its objective is to provide a three-year settling-down period during which time the employees affected by the proposed transaction can reach a determination as to whether they desire to work for Pacific Greyhound Lines or Golden Gate Transit Lines. During that three-year period their seniority and other terms and conditions of employment are protected. It is contemplated that at the end of the term of the contract those employees who desire to work for Pacific Greyhound Lines will be working for Pacific Greyhound Lines, those employees who desire to work for Golden Gate Transit Lines will be working for Golden Gate, and that there will be no further occasion for transfers as between the two companies.

Several days after the trial plaintiffs filed a written motion for leave to amend their complaint. The proposed amendment goes far beyond anything suggested to the Court at the time of the trial. The Union agreement is largely ignored, and instead, a wholesale assault is made upon the findings of the Commission and its denial of rehearing. Again, we have found no authority permitting such amendment. Leave to amend *after trial* should not be given except to conform to proof and obviously, plaintiffs' proposed amendment is not for this purpose.

It is understandable that courts do not favor amendments after trial. If a litigant who has lost confidence in [fol. 155] his original grounds of complaint were permitted to amend to inject additional issues after trial, the burden upon the courts as well as the parties would be intolerable. Such tactics were condemned in *Hart* v. *Knox County*, 79 F. Supp. 654 (E.D. Tenn., 1948) where the court, in denying a motion to amend the complaint after defendants' motion for summary judgment had been sustained, said:

> "But a different situation is presented here. Plaintiffs would shift their ground and try a new theory of recovery. The effect of the amendment they propose would be not to conform the pleadings to a judgment they have won, but to jeopardize and perhaps to overthrow a judgment they have lost. It is a prime purpose of paragraph (b) to avoid the necessity of new trials because of procedural irregularities, not to set judgments aside and make new trials necessary. If this latter application of the rule were permitted, a losing party, by motions to amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one. Courts draw a dividing line between this use of amendment and those uses aimed at conformity." (p. 658)

B. *Leave to amend should not be granted where the matter was well known to plaintiffs and could have been raised in the original complaint.*

The proposed amendment challenges the sufficiency of the evidence to support the findings of the Commission and

also challenges the action of the Commission in denying plaintiffs' petition for rehearing. All of these matters could have been incorporated in the original complaint, and were in fact considered by counsel for plaintiffs at the time he drafted the original complaint. There is no explanation in any of the papers now filed by plaintiffs as to why these allegations were omitted.

The Federal courts have refused in many instances to allow a party by belated amendment to inject into a case matters which could have been set forth in the initial plead-[fol. 156] ing. For example, in *Schick* v. *Finch*, 8 F.R.D. 639 (S.D. N.Y., 1944), the court said at page 640:

> "Rule 15(a), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes a liberal policy in granting leave to amend. A liberal policy does not mean the absence of all restraint. Were that the intention, leave of court would not be required. The requirement of judicial approval suggests that there are instances where leave should not be granted. The instant case, I believe, falls into such a category. *It is made on the very eve of trial. It proposes to change allegations which go to the heart of the issue without assigning an adequate cause for the modification. It is concerned with matters which, if true, must have been within the defendant's knowledge when the controversy arose.*" (Emphasis added)

In the case of *Redmond* v. *O'Sullivan Rubber Co.*, 10 F.R.D. 536 (W.D. Va., 1944), motion for leave to file an amended answer on the eve of a trial was denied because all of the matter set forth in the amendment could have been included in the original answer. The court said:

> "To continue the case further is highly undesirable. . . . *there appears no reason why the defendant could not have included in its original answer all of the matter set out in the proffered amended answer.* The original answer was not hastily filed but, as heretofore stated, was filed after time and that delay was due to the fact, as then stated by the defendant, that it wished to obtain all necessary data for the answer

> before preparing it and that the obtaining of this data was the cause of the delay. Even if there were additional matter which it wished to submit as a defense abundant time has occurred since last September to have assembled this without waiting until about six days before the trial to tender an amended answer, which, if permitted, will necessarily result in a further continuance of the case." (p. 538) (Emphasis added)

To the same effect is the case of

Hessian Hills Corp. v. Union Cent. Life Ins. Co., 1 F.R.D. 743 (S.D. N.Y., 1941)

where the court in denying leave to amend said:

> "Here the defendant had knowledge of all the facts [fol. 157] for many months prior to this application but apparently waited until the eve of trial to assert its request for relief." (p. 744)

The tactics of plaintiffs obviously stem from a desire to delay the operations of Golden Gate Transit Lines. This Court should not tolerate such delaying tactics, especially in view of the admonition in the law that cases of this character are to be handled with expedition. Counsel for plaintiffs knew at the time he prepared his complaint that he could have raised the issues presented by the proposed amendment. Several months passed and no effort was made to amend the complaint. Then on the day of the trial a conditional amendment of limited character was suggested. After the trial a far-reaching amendment was proposed and without one word of explanation as to why the matters were not incorporated in the initial complaint.

There are numerous instances where the Federal courts have refused to permit belated amendments under circumstances much less aggravated than those of the present case. In

Schaad v. *New York Life Ins. Co.*, 79 F. Supp. 463 (E.D. Tenn., 1948),

the court in disallowing an amendment adding new claims stated:

"* * * However, in this instance, an exercise of sound discretion would seem to require that plaintiff's motion be denied. This is solely on the ground that it was not presented until the day of the hearing, was seasonably objected to by defendant and, in the Court's opinion, with good reason." (p. 468)

In

Calhoun County v. *Roberts*, 148 F. 2d 901 (C.A. 5th, 1945),

a motion to amend the complaint was denied by the District Court. This order was affirmed by the Court of Ap- [fol. 158] peals which said:

"This relief was clearly an afterthought on the part of the Receiver and called into being an issue entirely foreign to the suit, and, under Rule 15 . . ., its disallowance was within the discretion of the trial court and, no abuse being shown, may not be disturbed on appeal." (pp. 903-4)

The cases of *Carroll* v. *Pittsburgh Steel Co.*, 103 F. Supp. 788 (W.D. Pa., 1952) and *Banking & Trading Corp.* v. *Reconstruction Finance Corp.*, 15 F.R.D. 360 (S.D. N.Y., 1954), are to the same effect.

It is true that plaintiffs have cited one case where a plaintiff was permitted to amend its complaint on the day of trial—not after the trial, as in this case. The United States Supreme Court upon review plainly looked with disfavor upon plaintiff's maneuver. It characterized the issue raised by the amendment as "clearly an afterthought." The Court further pointed out that it was brought forward "at the last possible moment" and went on to hold that the point had been waived by failure to assert it earlier in the proceedings. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). We should think that plaintiffs would find very little comfort in this case.

C. *Leave to amend should not be granted where the defendants will be prejudiced.*

Plaintiffs state that:

> "We can perceive no substantial prejudice to any of the defendants from permitting plaintiff to raise its additional grounds of attack on the Interstate Commerce Commission order at this time, as distinguished from having raised them at the original trial." (Plaintiffs' memorandum, p. 4)

[fol. 159] A piecemeal sttack (sic) on the Commission's order would never seem to be in the public interest, especially in view of the Congressional mandate for expedited review of the Commission's orders. We can well imagine the burden placed upon Government counsel in defending orders of the Commission if this litigation on the installment plan is permitted. Undoubtedly, Government counsel will speak for themselves.

We desire to stress the serious prejudice which would be experienced by defendants in intervention. Both the Public Utilities Commission and the Interstate Commerce Commission have found that the local operations of Pacific Greyhound Lines have been and are operated at heavy financial losses. A brief excerpt from the Commission's report (Exhibit A to the Complaint, Sheet 12) plainly demonstrates such prejudice caused by further delay herein.

> "A pro forma income statement shows that if Golden Gate had conducted the 'local' services, it would have had an estimated net operating loss of $234,300 for 1953 under then existing effective fares. At the time of the hearing Pacific had pending an application before the California Commission, filed on May 18, 1953, seeking an increase in its fares for operations in the Marin County area and, to a much smaller extent, in another county not here involved. Applicants estimated that the granting of the requested increase would provide additional annual revenue to Golden Gate of $254,000, thus changing Golden Gate's estimated deficit into an estimated net income of $19,700.

However, since issuance of the proposed report, the California Commission, on November 4, 1954, authorized an increase which, according to the report of the California Commission attached to applicant's exceptions, will produce estimated additional revenue of about $84,000 a year. *The California Commission, in granting that increase, recognized that if the then existing fares were continued during the year ending June 30, 1955, an estimated loss of $389,800 would be sustained for the Marin County operations, and that Pacific's losses for its overall California intrastate operations would be $1,202,200.* The California Commission explained that although the granted increase still would not provide sufficient revenue to cover the [fol. 160] cost of the Marin County operations, a sharp increase as proposed by Pacific would also fail to place the Marin County operations on a self-sustaining basis, because the law of diminishing returns would cause diversion from Pacific of a substantial part of its commutation patronage. To the extent this additional revenue may be applicable to the Marin County operations, the proportion or amount of which is not indicated, Golden Gate's estimated deficit would be decreased." (Emphasis added)

Thus the California Commission recognized that the Marin operations alone were producing an estimated loss in excess of $300,000 a year (more than $800 a day) at a time when Pacific's estimated losses for its over-all intrastate operations would be in excess of $1,000,000 per year. The removal of this burden on the interstate operations of Pacific Greyhound Lines is one factor which the Commission considered in making its finding that the proposed transaction is consistent with the public interest. Each day of delay postpones the time when this burden may be eliminated and the local operations made self-sustaining.

Conclusion

Defendants in intervention feel that it is nothing other than their duty to challenge the motivation of the pro-

posed amendment. It is so plainly lacking in merit as to call for its summary rejection. Plaintiffs' objective is to delay as long as possible the transactions authorized by the Commission's order.

Pacific Greyhound Lines is daily suffering heavy financial losses by reason of existing conditions from which relief can be afforded with assurance only by taking action in conformity with the Commission's order. In our judgment there should be no unnecessary delay.

[fol. 161] The motion for leave to amend should be denied and the complaint should be dismissed forthwith.

Respectfully submitted,

Allan P. Matthew, Gerald H. Trautman, 1500 Balfour Building, San Francisco 4, California, Douglas Brookman, 1815 Mills Tower, San Francisco 4, California, Attorneys for Golden Gate Transit Lines, Pacific Greyhound Lines, and The Greyhound Corporation, Defendants in Intervention.

McCutchen, Thomas, Matthew, Griffiths & Greene, 1500 Balfour Building, San Francisco 4, California, Of Counsel.

[fol. 162] CERTIFICATE OF SERVICE BY MAIL (omitted in printing)

[fol. 164] APPENDIX "A" TO MEMORANDUM

AFFIDAVIT IN OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT

[fol. 165] Gerald H. Trautman, being first duly sworn, deposes and says:

That he is one of the attorneys for defendants in intervention in the above entitled proceeding and as such is familiar with the proceedings before this Court as well as the proceedings before the Interstate Commerce Commission in this matter.

That on October 7, 1955, prior to the filing of the complaint in the above entitled action, affiant talked with Spurgeon Avakian, counsel for plaintiffs, concerning the character of the complaint to be filed by him in this proceeding. That at that time said counsel inquired of affiant as to whether the parties to the transaction approved by the Interstate Commerce Commission intended to carry out the transaction prior to a decision of this Court, so that he might know exactly how to frame his complaint. During this conversation, said counsel stated to affiant that he intended by his complaint to raise only the question of the jurisdiction of the Interstate Commerce Commission to approve the transaction under Section 5 of the Interstate Commerce Act and that he did not intend to challenge the findings of the Interstate Commerce Commission upon the ground that they are not supported by the evidence since he did not feel that he could successfully make such an attack. That based upon said conversation, affiant alleges that before the complaint herein was filed counsel for plaintiffs had knowledge of his right to challenge the findings of the Interstate Commerce Commission in his complaint and that he voluntarily elected not to do so.

That subsequently on December 30, 1955, affiant had another conversation with said counsel for plaintiffs con- [fol. 166] cerning the character of the trial to be had in this proceeding, the case then being at issue. That in said conversation affiant and said counsel discussed the necessity of filing with this Court at the time of such trial a certified copy of the record before the Interstate Commerce Commission. That in this connection said counsel for plaintiffs stated to affiant that he saw no reason to produce such a certified copy of the record before the Interstate Commerce Commission and that he did not intend to do so. That affiant agreed with said counsel for plaintiffs that this would be unnecessary inasmuch as the complaint and answer then on file raised only the jurisdictional issue. That based upon said conversation affiant alleges that before the trial herein on February 23, 1956, counsel for plaintiffs had knowledge of his right to produce a certified copy of the record before the Interstate

Commerce Commission at said trial and that he voluntarily elected not to do so.

/s/ Gerald H. Trautman

Subscribed and sworn to before me this 9th day of March, 1956.

Eva L. Nelson, Notary Public, in and for the City and County of San Francisco, State of California.

(Notarial Seal)

My commission expires October 3, 1956.

[fol. 167] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

COUNTY OF MARIN, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES, and THE GREYHOUND CORPORATION, Defendants in Intervention.

OPINION—April 12, 1957

Before Healy, Circuit Judge and Harris and Carter, District Judges.

Carter: District Judge.

This action has been brought to restrain the enforcement of, and to set aside an order of the Interstate Commerce Commission which approved and authorized a plan of the Pacific Greyhound Lines to transfer its San Francisco commuter operation to its new subsidiary, the Golden Gate Transit Lines, hereinafter referred to as "Pacific" and "Golden Gate", respectively, Jurisdiction of this Court is sought under 28 U.S.C. 2325 and 28 U.S.C. 2284. The

complaint attacks the authority of the Commission to make the order of approval, and has been brought by the counties of Marin, Contra Costa, each of which lies across the bay from San Francisco, and two commuter associations. Named as defendants are the United States and the Interstate Commerce Commission, and these parties, after answering, moved for a judgment on the pleadings. Golden Gate, Pacific, and the parent of Pacific, the Greyhound Corporation, all joining as defendants in intervention, have moved to dismiss the complaint for failure to state a claim. [fol. 168] Each of these motions raise the same question, whether the Commission was correct in ruling that section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C.A. §5 (2)(a), gave jurisdiction to approve the proposed transaction. That section requires approval of the Commission,

> ". . . for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly to purchase, lease, or contract to operate the properties, or any part thereof, of another; *or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise;* or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;". (Emphasis added)

It is the meaning of the italicized portion of the section which is in dispute here. The proposal is to transfer the properties and operating rights used to serve the San Francisco Bay Area commuter service, to Golden Gate, and Pacific would concurrently *acquire control* of Golden Gate by tak-back (sic) all of its capital stock. By the same transaction, Greyhound Corporation, through its ownership of Pacific, would also *acquire control* of Golden Gate. The

plaintiffs claim that this does not come within the italicized portion of Section 5(2)(a) because the section was only intended to cover cases where a carrier or carriers seek to acquire control of another *existing* carrier, and that Golden Gate will not acquire a carrier status until the operating rights of Pacific have actually been transferred to it.

We have no difficulty in finding that the proposed transaction is covered by the language of the section; it merely says that approval of the Commission is required when one carrier acquires control of another. That is precisely what the Greyhound Corporation and Pacific are seeking to do here; although Golden Gate will not attain the status of a carrier until the operating rights of Pacific are transferred to it, neither will the parent corporations acquire control until then, for the properties and operating rights are to be simultaneously exchanged for the stock.

The real thrust in the plaintiffs' argument that the section does not cover the proposed transaction lied (sic) in their contention of legislative purpose in enacting this legislation. It is argued that in enacting Section 5 Congress only intended to cover consolidations, unifications, and mergers of carrier control; that there was no intention to cover the [fol. 169] case of an existing carrier splitting up its operations, which Pacific seeks to do here. This version of the Congressional intention is buttressed, by excerpts showing that Congress, in enacting Section 5, as part of the Transportation Act of 1940, 54 Stat. 905, was endeavoring to inject economic strength into failing carriers, by permitting them to combine and consolidate, providing their plans met with certain other tests.

We assume that the cominant (sic) purpose of Section 5(a) was to reach cases in which carriers sought to unite their control. But we think the plaintiffs' version of Contressional (sic) purpose underlying Section 5 is too narrow, and that it ignores the whole regulatory scheme of the Interstate Commerce Act. Section 5(2)(a) was not newly conceived by the Transportation Act of 1940. We find that Section 5 of the Transportation Act of 1920, 41 Stat. 456, contained provisions substantially like those found in the present statute. While the 1920 Act applied only to railroad

carriers, Congress had already determined the necessity of subjecting transactions affecting carrier control to the scrutiny of the Interstate Commerce Commission. In 1948, the Supreme Court reiterated the purpose of the 1920 Act in *Schwabacher* v. *United States*, 334 U.S. at 182, where it said:

> "In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway policy to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, *to control rate and capital structures, physical make-up and relations between carriers*, in the light of the public interest in an efficient national transportation system. (Citing cases)." (Emphasis added).

So far as it was the purpose of congress to have the Interstate Commerce Commission control the capital structure, physical make-up and relations between carriers under the power conferred by Section 5, we are unable to read out of the statute the transaction at hand.

We also find support for upholding the jurisdiction of the Commission here in *New York Central Securities Co.* v. *U. S.*, 287 U.S. 12, (1932). The question was whether Section 5(a) then applying only to Railroad carriers (41 Stat. 456) and requiring Commission approval when one carrier acquired control of another "either under a lease or by the purchase of stock" reached a transaction where a parent corporation leased the properties of its sub- [fol. 170] sidiary. The Supreme Court held that the leasing constituted an acquisition of control within the language of the Act, over the argument that the parent already controlled the carrier properties through its ownership of the stock of the subsidiary. There was no new control acquired that did not exist before in a different degree,

but merely a change in the form of the control. The proposal in the instant case is to change the degree or form of control over the properties of the carrier, by transferring them to the subsidiary Golden Gate, and we think that the above holding requires that it be approved by the Commission under the present Section 5(2).

We find no cases construing the pertainent (sic) language of Section 5(2)(a) since it was expanded to include motor carriers, but there are judicial decisions construing comparable provisions in the Civil Aeuronauties (sic) Act. Section 408 of that Act (49 U.S.C.A. 488) provides that:

> (a) It shall be unlawful, unless approved by order of the Board as provided in this section ..... (5) for any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;"

In *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (C.C.A. 2, 1941), American Export Airlines Inc., organized as a subsidiary to American Export Lines, Inc., a common carrier by water, applied to the Civil Aeronauties Board for a certificate permitting it to do business as an air carrier, and in additiona, (sic) approval of control of it by its parent American Export Lines, under the above section. The Board dismissed the application for approval of control, In (sic) the same theory which plaintiffs invoke here, viz., the control provision did not reach a transaction unless the air carrier sought to be controlled was already an air carrier. Judge Hand rejected this interpretation, reversed the dismissal, and remanded the case to the Board, stating:

> "This seems to us an unduly literal interpretation of subdivision (5). In our opinion 'to acquire control of any air carrier in any manner whatsoever' is to take all steps involved in obtaining control, which in this case would consist in supplying a subsidiary corporation, organized for air carriage and possessing adequate financial resoueces with a certificate authorizing operation. Any other interpretation would enable

> a steamship company, by organizing a subsidiary for air carriage, to escape the requirement of Section 408(b) that the 'Authority shall not enter . . . an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.'"

[fol. 171] The reasoning of Judge Hand is equally applicable here. Section 5(2), subdivision (c) of the Interstate Commerce Act Supplements Section 5(2)(a) in stating:

> "In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

If Greyhound is free to make substantial alterations in its corporate structure, to create subsidiaries to take over part of its existing operation, or perhaps to venture into new areas, without the necessity of seeking Commission approval, the function of that body to assure adequate transportation service to the public is unduly restricted.

Finally, we note that the Interstate Commerce Commission itself has, on other occasions, ruled that the type of transaction which Pacific Greyhound proposes is a Section 5 transaction. See: *Columbia Motor Service Co.—Purchase—Columbia Terminals Co.*, 35 M.C.C. 531, and *Consolidated Freightways Inc.,—Control—Consolidated Convoy Co.*, 36 M.C.C. 351, which were decided shortly after section 5(2) was enacted into its present form. In each of these cases motor carriers sought and obtained Commission approval to transfer a part of their operation to a newly created corporation, whose carrier status had to await the completion of the transaction. See also: *Takin—Purcha —Takin Bros. Freight Line, Inc.*, 37 M.C.C. 626, and *Gelhous & Holobinko—Control*, 60 M.C.C. 167. The

Supreme Court has made itself clear regarding the weight to be given to Commission interpretations of the Interstate Commerce Act. In *United States v. American Trucking Associations*, 310 U.S. 534 (1940) at 549 it said:

> "In any case such interpretations are entitled to great weight. This is peculiarly true where the interpretations involve contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

We therefore hold that the Commission was correct in holding that it had jurisdiction to approve the transaction in question, and both motions should be granted.

There remains one further issue to be decided. During the final arguments on the motions to dismiss and for [fol. 172] judgment on the pleadings plaintiffs, County of Marin, County of Contra Costa, Marin County Federation of Commuters Clubs, and Contra Costa Commuters Association, asked for permission to amend the complaint. After the motions had been submitted these plaintiffs formally moved the Court for permission to amend the complaint by adding allegations challenging the findings of the Commission that the transaction between Pacific and Golden Gate was consistent with the public interest, and that the Commission abused its discretion in denying plaintiff's petition for rehearing and reconsideration. The effect of the motion to amend is to inject into the case the completely new issue of the sufficiency of the evidence to support the findings of the Commission. The complaint, as originally framed, raised only the issue of jurisdiction, and the motions to dismiss and for judgment on the pleadings were argued and submitted only on that issue. Plaintiffs concede that the proposed amdnement (sic) attempts to raise issues known to them at the time of the hearings on the motions. They argue, however, that under the liberal provisions of Rule 15(a) of the Federal Rules of Civil Procedure the amedments (sic) should be permitted.

The motion for leave to amend is addressed to the sound discretion of the Court, and must be decided upon the

facts and circumstances of each particular case. It would serve no useful purpose to review the many cases dealing with Rule 15. It is sufficient to say that the power of the Court to permit amendment should not be used to completely change the theory of the case after the case has been submitted to the Court on another theory without some showing of lack of knowledge, mistake or inadvertence on the part of the party seeking amendment, or some change of conditions of which that party had no knowledge or control. Plaintiffs have made no such showing here. The motion to amend is denied.

Counsel for defendants and defendants in intervention are directed to prepare and present orders in conformity herewith.

Dated: April 12th, 1957.

/s/ William Healy, Circuit Judge.

/s/ Oliver J. Carter, District Judge.

[fol. 173] NOTE OF JUDGE HARRIS RE CONCURRENCE AND DISSENT

I concur in the majority opinion upholding the jurisdiction of the Commission. I dissent in the refusal of the Court to grant plaintiffs permission to amend the complaint regarding the issue of the sufficiency of the evidence.

A memorandum of my views to follow hereafter.

Dated: April 12, 1957.

/s/ George B. Harris, District Judge.

[File endorsement omitted]

[fol. 174] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

ORDER EXTENDING TIME TO PRESENT ORDERS—April 17, 1957

Upon motion of the attorneys for the defendants and with good cause shown, the time for the defendants and defen-

dants in intervention to prepare and present orders in conformity with the decision of the three-judge court dated and entered April 12, 1957 in this cause is hereby extended to and including April 29, 1957.

Dated: April 17, 1957

/s/ William Healy, United States Circuit Judge

[fol. 175] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Civil Action No. 34985

COUNTY OF MARIN, COUNTY OF CONTRA COSTA, MARIN COUNTY FEDERATION OF COMMUTER CLUBS, CONTRA COSTA COUNTY COMMUTERS ASSOCIATION, and AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, Divisions 1055, 1222, 1223, 1225 and 1471, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES and THE GREYHOUND CORPORATION, Defendants in Intervention.

CONCURRING AND DISSENTING OPINION OF JUDGE HARRIS—April 17, 1957

Dated: April 17, 1957.

George B. Harris, United States District Judge.

[fol. 176] Judge Harris, concurring in part and dissenting in part:

(Defendants in intervention Golden Gate Transit Lines and Pacific Greyhound Lines shall be hereinafter referred

to as "Golden Gate" and "Pacific" respectively, as in the majority opinion.)

I concur in the majority opinion upholding the jurisdiction of the Commission. I dissent in the refusal of the Court to grant plaintiffs permission to amend the complaint regarding the issue of the sufficiency of the evidence.

The motion to amend the complaint and the proposed amendment itself must be considered in the light of the historical events and proceedings conducted by the defendant in intervention, Pacific, before the California Public Utilities Commission (formerly the Railroad Commission of California).

The granting or refusing to grant leave to amend cannot be viewed in a judicial vacuum, nor can the determination and the exercise of a sound discretion be reached without a regard for the realities, and the background and motives which inspired Pacific to invoke the procedural technique hereafter adverted to.

Particularly is this so by reason of the admission made by Pacific that it invoked the procedure under Section 5(2)(a) of Title 49 U.S.C.A., before the Interstate Commerce Commission, creating Golden Gate, in order to circumvent the rate-making authority and jurisdiction of the California Public Utilities Commission. In short, the foregoing section was availed of as a legal device to avoid not only the proceedings and decisions which will be reviewed immediately hereafter, but as well, the express agreement made by [fol. 177] Pacific, which in turn inured or should inure to the benefit of residents and commuters of the bay area communities involved in this litigation.

Judicial notice may be had of the fact that Pacific has appeared before the California Public Utilities Commission on numerous occasions in connection with its operations in Marin and Sonoma Counties.[1] In 1939 it made its application to replace Northwestern Pacific Railroad which was then serving commuters by means of rail and ferryboat service. When many North Bay residents protested at the proposed change, Pacific assured the California Railroad Commission that it would assume the exclusive transporta-

[1] 42 Ry. Comm. 372 and 661; 50 PUC 650; 53 PUC 634, etc.

tion service on a minimum financial recovery basis. (42 Opinions and Orders of the Railroad Commission of California 661) At page 668 the following language appears in the opinion of the Commission:

"The record, as it now stands, shows conclusively that the Greyhound is the only carrier which is able financially and otherwise to provide Marin County with a service to take the place of that to be abandoned. It has made a firm offer to substitute its proposed service for that of the Northwestern Pacific in event it is granted authority to serve the entire territory to be abandoned by the rail carrier.

The record shows that the Pacific Greyhound Lines made its proposal not with the thought that it would return the full cost of operation, but that it would realize something over and above the out-of-pocket cost of operation. The inference may be fairly drawn that the decision to embark upon this undertaking was made with some hesitation and only after a long and complete study of its feasibility. It may be that the Pacific Greyhound Lines was influenced to some extent by the fact that if its application were granted and the Northwestern Pacific Railroad authorized to abandon service, the Northwestern Pacific Railroad, a wholly owned subsidiary of the Southern Pacific Company,(') would be relieved of a substantial continuing out-of-pocket loss. [(') The Southern Pacific Company owns approximately 39% of the common stock of the Pacific Greyhound Lines]

[fol. 178] "Whatever may have been the underlying reasons which influenced the Greyhound to make this offer is relatively unimportant, as the record leaves no doubt that it was made in good faith and with the avowed purpose of providing Marin County with a satisfactory, adequate, and enduring transportation service. These underlying reasons only become important in evaluating the statement of the Greyhound, heretofore quoted, to the effect that a denial of the right to serve Mill Valley would necessitate a withdrawal of its offer and a resurvey of the entire proposal."

The order of the Commission based upon its pleadings and opinion concluded as a condition for the granting of a certificate of public convenience and necessity that:

> "(4) The rights and privileges herein authorized may not be discontinued, sold, leased, transferred, nor assigned unless the written consent of the Railroad Commission to such discontinuance, sale, lease, transfer, or assignment has first been obtained."

At a recent hearing, Pacific admitted that it had agreed to operate without hope of financial reward except the realization of sufficient returns to cover the actual out-of-pocket costs of the North Bay venture.

The foregoing review is significant by reason of the recent Supreme Court decision in Pacific Gas and Electric Co. v. Sierra Pacific Power Co., 350 U.S. 348, decided shortly after the instant ruling of the Interstate Commerce Commission.

In setting aside an order of the Commission and remanding the Pacific Gas and Electric Company case, the Supreme Court held that a public utility may not be relieved of an improvident bargain even though such bargain produces less than a fair rate of return on its investment. The Commission's duty is to protect the *public interest* as distin- [fol. 179] guished from the "*private interests of the utilities.*" A contract is neither unjust nor unreasonable merely because it is unprofitable to the utility. The express agreement of Pacific with the California Railroad Commission dated May 21, 1940, provident or improvident, cannot be ignored.

By parity of reasoning, when the ICC reviews local operations of Pacific it must consider its financial returns in terms of the public interest. Even though income realized from a specific sector is less than a fair rate of return, Pacific is not entitled to relief in the absence of proof of losses (not offset by intrastate revenue), which place a burden on interstate commerce.

Plaintiffs in their proposed amendment to the complaint have sought to point out the frailties in Golden Gate, as well as the avoidance on the part of Pacific of the agreement

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[2] Vol. 53 California Public Utility Commision (sic) Reports 634.

made in the vital proceedings before the California Public Utilities Commission—vital in the sense that the proceedings sought to and did protect the public interest as distinguished from the "private interest of the utilities." (Cf. Pacific Gas and Electric Co. v. Sierra Pacific Power Co., supra)

The proposed amendment sets forth and challenges the findings of the ICC as to the financial ability of Golden Gate to operate. They charge that their limited capital structure—contributed by Pacific—and the narrow scope of their operations preclude economic success. The amendment also challenges numerous findings pertaining to Golden Gate as a carrier, contending that there is no substantial evidence to show that the local operations will support this carrier. If, in fact, such operations now earn a fair return for Pacific, the latter had no basis for complaining about the intrastate drain on its interstate business and the supposed [fol. 180] burden placed upon interstate passengers.

Plaintiffs' allegations establish the necessity for a complete hearing and review before this Court. This is especially so in view of the fact that Pacific has undertaken to avoid the consequences of its agreement with the California Public Utilities Commission (see especially pp. 672, 673 of 42 Ry. Comm. of California), by disposing of its local operations to an independent, but wholly owned subsidiary without first obtaining written consent from the California Commission, which is opposed to the transfer.

Under all of the circumstances[4] and in the exercise of a sound and liberal discretion, (Rule 15(a) FRCP), plaintiffs' motion to amend should be granted, since "justice so requires."[5]

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[4] Cf. Breswick & Co. v. United States, 138 F.Supp. 123, 137, 138.

[4] It should be observed that no defendant will suffer any substantial prejudice by permitting plaintiffs to amend their complaint. The California Public Utilities Commission granted Pacific a rate increase on its local operations shortly after this matter was argued and submitted to the court.

[5] Armstrong Cork Co. v. Patterson-Sargent Co., 10 FRD 534; McDowall v. Orr Felt & Blanket Co., 146 F.2d 136; Maryland Casualty Co. v. Rickenbaker, 146 F.2d 751; Lloyd v. United Liquors Corp., 203 F.2d 789; and L. A. Tucker Truck Lines, Inc. v. United States, 100 F.Supp. 432.

As a matter of alternative relief, consistent with the Supreme Court decision in Pacific Gas and Electric Co. v. Sierra Pacific Power Co., supra, consideration should be given to a remand of said cause to the Interstate Commerce Commission for further proceedings."

"Cf. United States v. Ohio Power Co. (Supreme Court) decided April 1, 1957, #312, Oct. Term 1955; Inland Freight Corp. v. United States, 60 F.Supp. 520 (9th Cir.); Clarke v. U. S., 101 F. Supp. 587; Carolina Freight Corp. v. United States, 38 F.Supp. 549)

[fol. 181] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

COUNTY OF MARIN, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

GOLDEN GATE TRANSIT LINES, PACIFIC GREYHOUND LINES and THE GREYHOUND CORPORATION, Defendants in Intervention

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JUDGMENT—May 3, 1957

The motion of the defendants United States of America and Interstate Commerce Commission for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and the motion of the defendants in intervention Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation to dismiss the complaint herein pursuant to Rule 12(b) of the Federal Rules of Civil Procedure having come on for hearing before the special statutory three-judge District Court on February 23, 1956, and the motion of the plaintiffs for leave to amend their complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure having come on for hearing before the same Court on April 20, 1956, and briefs having been filed, argument of counsel having been heard, and the Court having given due consideration to the issues thereby pre-

sented, and having filed its opinion on April 12, 1957, setting forth its conclusions, and it appearing to the Court that the said motions for judgment on the pleadings and to dismiss the complaint should be granted and that the said petition for leave to amend the complaint should be denied;

[fol. 182] It Is Hereby Ordered, Adjudged and Decreed that the complaint herein be and it is hereby dismissed with prejudice; that the petition for leave to amend the complaint be denied; and that said defendants and defendants in intervention do have and recover their costs herein from the plaintiffs.

Dated: May 3, 1957.

/s/ William Healy, Judge.

/s/ Oliver J. Carter, Judge.

I concur in the foregoing, save and except as to the refusal of the Court to permit plaintiffs to amend their complaint (see Concurring and Dissenting Opinion heretofore filed);

/s/ George B. Harris, Judge.

Approved as to form, pursuant to Rule 21 of this Court:

County of Marin, et al., Plaintiffs, By /s/ Spurgeon Avakian, Their Attorney.

United States of America and Interstate Commerce Commission, Defendants, Lloyd H. Burke, By /s/ Wm. B. Spohn, Their Attorneys.

Golden Gate Transit Lines, Pacific Greyhound Lines and The Greyhound Corporation, Defendants in Intervention, By /s/ Allen P. Matthew, Their Attorney.

[File endorsement omitted]

[fol. 183] UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF ENTRY OF JUDGMENT—May 3, 1957

To

Mr. Spurgeon Avakian, Attorney, Financial Center Building, Oakland 12, California.

United States Attorney, PO Building, San Francisco.

Mr. Robert W. Giannane, Attorney, Interstate Commerce Commission, Washington 25, D. C.

Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, Attys., 1500 Balfour Building, San Francisco.

You Are Hereby Notified that on May 3, 1957 a Judgment was entered of record in this office in the above entitled case.

C. W. Calbreath, Clerk, U. S. District Court

San Francisco, California, May 3, 1957.

[fol. 184] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 29, 1957

1. Notice is hereby given that County of Marin, County of Contra Costa, Marin County Federation of Commuter Clubs, and Contra Costa County Commuters Association, the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the judgment and order, dated, filed, and entered in this action on May 3, 1957, dismissing the complaint and denying leave to amend the complaint. This appeal is taken pursuant to 28 U.S.C. Section 1253.

[fol. 185] 2. The Clerk will please prepare a transcript of the record in this cause, for transmittal to the Clerk of the Supreme Court of the United States, and include in said transcript the following: All the pleadings filed by the plaintiffs, the defendants, and the defendants in intervention, and the judgment and the opinion of the court, including the concurring and dissenting opinion of Judge Harris; the notice of entry of judgment; the complaint, together with Exhibits A to D appended thereto; the joint answer of the United States and the Interstate Commerce Commission; the motion by defendants in intervention for leave to intervene, and the order granting same; the order designating a 3-judge court; the motions for judgment on the pleadings and for dismissal; the motion for leave to amend the complaint, together with proposed amendment to complaint with Exhibit E attached; stipulation of dismissal with prejudice; affidavit of Gerald H. Trautman in opposition to motion for leave to amend complaint, dated March 9, 1956; dismissal with prejudice; and order of dismissal with prejudice.

3. The following questions are presented by this appeal:

a. The first question presented by this appeal is whether the exclusive and plenary power which Section 5 of the Interstate Commerce Act vests in the Interstate Commerce Commission with respect to consolidation and merger of carriers and carrier operations extends to a split-up of motor carrier operating rights under which an existing carrier proposes to transfer a portion of its operating rights to a newly created subsidiary which is not yet a carrier; or whether such a split-up falls under Section 212 (b) of the Act with respect to the interstate operating rights, and under the jurisdiction of the appropriate state commission with respect to the intrastate rights.

b. The second question presented by this appeal is [fol. 186] whether the court abused its discretion in denying plaintiffs' motion for leave to amend the complaint so as to challenge the sufficiency of the evidence on which the Interstate Commerce Commission based its decision; to challenge certain of the findings of the Interstate Commerce Commission as being contrary to the evidence or not based on any

evidence; and to charge the Interstate Commerce Commission with abuse of discretion in denying plaintiffs' petition for a rehearing.

Spurgeon Avakian, J. Richard Johnston, By Spurgeon Avakian, Attorneys for Appellants.

PROOF OF SERVICE (omitted in printing).

[fol. 187] IN UNITED STATES DISTRICT COURT

APPLICATION FOR ENLARGEMENT OF TIME FOR DOCKETING CASE ON APPEAL—Filed June 26, 1957

The plaintiffs named above, through their attorney, apply to the Court for an order enlarging the time for docketing the case on appeal and filing the record thereof with the Clerk of the Supreme Court of the United States to and including September 2, 1957.

This application is made pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States and is based on the Affidavit of Spurgeon Avakian filed herewith and on the papers on file in this matter.

Respectfully submitted,

/s/ Spurgeon Avakian, Attorney for Plaintiffs and Appellants.

[File endorsement omitted]

[fol. 188] AFFIDAVIT OF SPURGEON AVAKIAN FOR ENLARGEMENT OF TIME TO DOCKET CASE ON APPEAL

State of California,
County of Alameda, *ss.*

Spurgeon Avakian, being first duly sworn, deposes and says as follows:

I am the attorney for the plaintiffs named above, and, in that capacity on May 29, 1957, I filed with the Clerk of the above-entitled Court a Notice of Appeal to the Supreme

Court of the United States from the judgment and order of the above-entitled court entered in said matter on May 3, 1957.

Pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, the above-entitled plaintiffs, as appellants, must docket the case and file the record thereof with the Clerk of the Supreme Court of the United States within sixty days after the filing of the Notice of Appeal, but any judge of the Court whose decision is being appealed may, for good cause shown, enlarge the time for docketing the case. The printed statement as to jurisdiction must be filed by counsel for the appellants upon the filing of the record with the Clerk of the Supreme Court of the United States.

Affiant has been advised by the office of the Clerk of the above-entitled Court that the preparation of the record on appeal in this matter will probably be completed sometime during the week of July 1, 1957. Affiant plans to leave for the Eastern part of the United States on July 2, 1957, and to return to California on August 5, 1957. The primary reason for affiant's trip is to attend the American Bar Association Convention in New York commencing July 9, 1957, and his attendance at that Convention is required by reason of the fact that he is a committee chairman in the Tax Section of the American Bar Association. In connection with this Convention, affiant has arranged to be accompanied by his family and to take a family vacation following the Convention. These plans were made more than six months ago, and affiant's plans with respect to the conduct of his law practice and the scheduling of vacations in his office have been arranged accordingly.

In view of the foregoing, affiant is submitting this affidavit in support of an application to enlarge the time for docketing the case on appeal in the above-entitled matter to and including September 2, 1957.

/s/ Spurgeon Avakian

Subscribed and sworn to before me this 26th day of June, 1957.

(seal) /s/ Miye Tabenchi(?), Notary Public in and for said County and State.

[File endorsement omitted]

[fol. 189] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME FOR DOCKETING CASE AND FILING RECORD—June 26, 1957

Based on the Affidavit of Spurgeon Avakian filed herewith and on application of counsel for plaintiffs, and good cause appearing,

It Is Hereby Ordered, pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, that the time within which the plaintiffs named above may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States be and it hereby is enlarged to and including September 2, 1957.

Dated this 26 day of June, 1957.

/s/ Oliver J. Carter, United States District Judge.

[File endorsement omitted]

[fol. 190] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

[Title omitted]

CROSS-DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD—Filed August 19, 1957

Pursuant to Rule 12, paragraph 1, of the Revised Rules of the Supreme Court of the United States, the United States of America and the Interstate Commerce Commission, defendants in the above-entitled case, hereby designate the following portions of the record to be certified to the Supreme Court (in addition to the portions designated by the plaintiff-appellants):

1. Memorandum of the United States and the Interstate Commerce Commission in Opposition to Motion for Leave to Amend the Complaint;

2. Memorandum of Defendants-in Intervention in Opposition to Motion for Leave to Amend Complaint.

Respectfully submitted,

Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorney for Interstate Commerce Commission.

Victor R. Hansen, Assistant Attorney General.

Lloyd H. Burke, United States Attorney.

James E. Kilday, John H. D. Wigger, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

[fol. 191] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 192] Supreme Court of the United States

No. 415—October Term, 1957

County of Marin, County of Contra Costa, Marin County Federation of Commuters Clubs, and Contra Costa County Commuters Association, Appellants,

v.

United States of America, Interstate Commerce Commission, Golden Gate Transit Lines, et al.

Order Noting Probable Jurisdiction—November 12, 1957

Appeal from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdistion (sic) is noted.

November 12, 1957